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ANDREW L. FREESE

50 IBLA 26

Decided *September 9, 1980*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying a petition for deferment of assessment work on various unpatented lode mining claims and millsites. I 14532.

Affirmed as modified.

1. Mining Claims: Generally—Mining Claims: Assessment Work

In order to obtain a temporary deferment, a claimant must file with the authorized officer of the proper office a petition in duplicate requesting such deferment. The applicant must attach to one copy thereof a copy of the notice to the public required by the Act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded.

2. Mining Claims: Generally—Mining Claims: Assessment Work

A petition for deferment of annual assessment work is properly denied where a claimant's mining claims and millsites have been declared null and void by the Department.

APPEARANCES: Andrew L. Freese, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Andrew L. Freese appeals from a Feb. 6, 1980, decision of the Idaho State Office, Bureau of Land Management (BLM), which rejected his petition for deferment of assessment work on appellant's mining claims, which are located within the Sawtooth National Recreation Area.[1] The decision noted that appellant had failed to attach a copy of the required notice to the public, showing that it had been filed or recorded in the office in which the notices or certificates of location were filed or recorded. *See* 43 CFR 3852.2(a). Secondly, the BLM decision adverted to an order entered by the United States Court of Claims dismissing a suit brought by petitioner relating to all of the instant mining and millsite claims.

The "Pole" group of mining claims and millsites were the subject of a Government contest I–9758. By decision dated Mar. 6, 1978, Administrative Law Judge Harvey C. Sweitzer declared all of the claims null and void. On Apr. 22, 1978, while the case was on appeal to this Board, appellant requested a deferment of annual assessment work for the "Pole" mining claims, pending the outcome of his appeal. This application was deficient for various reasons, and on May 18, 1978, appellant filed a second petition accompanied by the required fee and containing the ad-

[1] The mining claims and millsites will be treated as two distinct groups for the purposes of this decision. The "Pole" group will consist of: Pole #3 through #16, Pole #18, Pole #21, Pole #31, Pole A, B, and C, URA, and WO3. The "URA" group will include the URA #2, URA #4, URA #5, URA #9, URA #10, URA #11, URA #13, URA #14, and She Lode.

ditional information requested. On July 26, 1978, the State Office granted appellant's request for deferment of assessment work for the period from Oct. 1, 1977, to Sept. 30, 1978.[2] On Sept. 6, 1978, subsequent to the grant of this deferment, the Board, by decision styled *United States* v. *Freese*, 37 IBLA 7 (1978), affirmed the decision of the Administrative Law Judge in all respects.

The "URA" group of mining claims and millsites were the subject of a separate contest I–13341. The contest complaint in this case had been filed on Apr. 27, 1977, and an answer was duly filed. After various postponements a hearing was scheduled for May 22, 1979. On Feb. 26, 1979, however, attorney for appellant "withdrew his opposition to the contest." By order dated Mar. 8, 1979, Administrative Law Judge Michael L. Morehouse took the allegations of the complaint as admitted and declared all of the claims null and void. No appeal was taken from this decision.

Appellant filed a suit for judicial review of the Board's decision in *United States* v. *Freese*, *supra*, in United States District Court, *sub nom. Freese* v. *Andrus*, Civ. 78–1314 (D. Idaho, filed November 20, 1978). That suit was voluntarily dismissed without prejudice. Appellant had also filed suit in the United States Court of Claims, seeking, *inter alia*, compensation for alleged inverse condemnation of the mining claims and millsites in both the "Pole" and "URA" groups. *Freese* v. *United States*, No. 334–78 (Ct. Cl., filed July 24, 1978). On October 10, 1979, appellant sought a second deferment of annual assessment requirements, expressly referring to his suit in the Court of Claims.

On Nov. 9, 1979, the Court of Claims dismissed appellant's suit regarding all of the claims at issue herein, expressly finding that it did not have jurisdiction to review the Department of the Interior's conclusion that these claims were invalid. On Feb. 6, 1980, the Idaho State Office issued the decision which is the subject of the instant appeal.

Initially, we would note that to the extent that appellant sought a deferment of annual assessment work for the five subject millsites, the petition must be rejected, though not for the reasons given by the State Office. Succinctly stated, there is no requirement that a millsite claimant perform *any* assessment work. It is impossible to grant a meaningful and efficacious deferment where there is no requirement to perform assessment work.

[1] With regard to the question whether or not appellant had filed a copy of the notice to the public required by the applicable regulation, 43 CFR 3852.2(a), appellant points out that the certification was located in the middle of his petition

[2] Pole #17 lode mining claim was included within this application. Pole #17 was originally included in contest No. I–9758, but was dismissed from the proceeding. By separate decision of July 26, 1978, the requested deferment for this claim was denied on the grounds that since it was no longer involved in the contest proceeding there was no basis for granting a deferment.

for deferment, and further argues that this was precisely the method he had utilized in his earlier petition, which BLM had granted. With regard to the statement of the recorder that such a notice was recorded, appellant argues that a great deal of time transpires between the filing and recording of a notice, and the receipt of proof of recordation from the county recorder's office, and that in the instant case appellant did not receive the notice from the county recorder until Feb. 4, 1980, only two days prior to the State Office decision.

As regards the form of the certification, the record bears out appellant's contention. The form of certification which appellant utilized in his second petition for deferment is exactly the same as that which he used in his original petition which the State Office granted. Thus, we are led to the conclusion that it was the absence of a certification by the county recorder, attesting that the petition had been filed with that office, which served as the basis for the State Office's decision. We feel that were this the only deficiency in appellant's petition, the State Office's decision could not be sustained. The State Office should have informed appellant of the deficiency and given him an opportunity to supply the necessary document. We note that appellant's original petition for deferment had been deficient in a number of ways, including a failure to submit the requisite filing fees. His petition was not rejected at that time; rather, he was given an opportunity to cure the deficiencies. We see no reason why such an opportunity was not afforded appellant herein.

[2] The State Office, however, also premised its rejection of appellant's petition, on the decision of the Court of Claims dismissing appellant's suit as concerned the instant claims. Appellant contends that the decision of the Court of Claims was interlocutory in nature and that he intends to pursue his appeal to the United States Supreme Court. But until a court of competent jurisdiction rules otherwise, appellant's claims have been finally determined by the Department to be a nullity. With particular regard to the "URA" group of claims, we would point out that appellant withdrew his answer to the Government contest, which Judge Morehouse correctly found was the same as admitting the charges contained in complaint I–13341. Appellant failed to appeal judge Morehouse's decision to this Board. Thus, appellant did not exhaust his administrative remedies, as required by 43 CFR 4.21(b), and may not now seek judicial review. *See Rawls* v. *Secretary of the Interior*, 460 F.2d 1200 (9th Cir. 1972). The "URA" claims have been finally held to be invalid, and no deferment for assessment work can be granted as no claims now exist.

Concerning the "Pole" group of claims, we note that the applicable statute, sec. 1, c. 232 of the Act of June 21, 1949, 63 Stat. 214, 30

U.S.C. § 28b (1976), provides, in pertinent part, that:

> [Annual assessment work] may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied *or is in litigation* or is in the process of acquisition under State law or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof. [Italics supplied.]

Appellant argues in effect that the claims are still in litigation and that therefore he clearly qualifies for a deferment. While the absence of any meaningful punctuation in this section clearly creates interpretative problems, the sequence of phrases, as well as the legislative history, demonstrates that it is not the "claims" which must be in litigation, but rather "access" to the claims must be the subject of dispute.

With reference to the sequence of phrases, it must be noted that the phrase "or is in litigation" is followed by the phrase "or is in the process of acquisition under State law." This section is, necessarily, only applicable to unpatented claims, the legal title of which resides in the United States until issuance of patent. Thus, if the antecedent of this latter phrase were "mining claim" this section would be insensible as there is no authority by which State law may permit the acquisition of lands in Federal ownership. This phrase must, therefore, relate to access to the claim rather than the claim itself.

The legislative history of this section, though meager, supports this interpretation. Examples of situations in which the provisions of this law could be invoked were provided in S. Rep. No. 405. The Congress particularly noted that the bill would cover "[d]elays in causing legal condemnation of rights-of-way, which can be contested for a long time in the courts." S. Rep. No. 405, 81st Cong., 1st Sess. reprinted in [1949] U.S. Code Cong. & Ad. News 1404. Concerning the phrase "is in litigation" the Senate report took express notice of the "[d]elays in overcoming by court action the posting of 'No trespass' signs on roads which have been used by the public for many years but have never been declared public roads." *Id.* Thus, it is clear that the subject matter of the litigation must be access to the claim and not the claim itself.

The final alternative listed in sec. 28b, however, relates to a showing that "other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim." Appellant argues that it is unlikely that the administration of the Sawtooth National Recreation Area will approve an operating plan for the performance of assessment work as required by 36 CFR 292.18(c).

The Board has interpreted this part of sec. 28b on a number of different occasions, most recently in *Charlestone Stone Products, Inc.*,

32 IBLA 22 (1977). Therein, the Board stated:

> The major policy goal implicit in the language of this statute is the protection of claimants whose rights of access to their claims have been impeded or denied. The relief provisions of the statute are intended to be triggered by considerations of relative necessity, not inconvenience or ordinary business risk.

Id. at 23. In that case, the Board noted that its decision, while still in litigation, had been reversed by the district court, and held that "this legal dispute, even if ultimately prolonged by a grant of certiorari by the United States Supreme Court, does not constitute a 'legal impediment' within the meaning of [sec. 28b]." *Id.*

A significantly different problem is presented in the instant appeal. Unlike the lands embraced by the *Charlestone Stone Products* claims, lands within the Sawtooth National Recreation Area are not open to new mineral entries. *See* sec. 10, Act of Aug. 22, 1972, 86 Stat. 612, 614, 16 U.S.C. § 460aa–9 (1976). Moreover, there has been no judicial disturbance of the Board's decision relating to the invalidity of the claims, though appellant avers that he intends to pursue this matter to the Supreme Court. In effect, the question is whether it is possible to grant a petition for deferment of assessment work when the claim for which the petition is sought has been determined finally, within the Department, to be invalid where there has been no contrary judicial finding. We hold that such a petition may not be granted; allowance of such a petition would constitute an action directly contrary to, and inconsistent with, the finding of invalidity.

While it is possible that a Federal court may subsequently determine that the Department's decision invalidating a claim was erroneous, until such a decision is rendered there is no cognizable claim against the Government. In the absence of a timely appeal, the decision of the Department is final and of immediate effect. The effect of a court reversal is to reinstate a claim, on a *nunc pro tunc* basis. But until such action occurs, there is no claim extant. Thus, there is no assessment work obligation, and no possibility for obtaining a deferment of assessment work.

To hold otherwise would require that the Government grant a deferment of assessment work for a claim whose existence the Government denies. Moreover, inasmuch as the statute provides for only 2 years of deferment, regardless of the justification (*see Charlestone Stone Products*, *supra* at 24; 30 U.S.C. § 28c (1976)), the Government might well be require, even in the case of withdrawn land, to permit the performance of assessment work, and the concomitant surface disturbance, in situations in which the Department has declared the claim a nullity. At least as regards withdrawn land, such a result would seem contrary to elementary logic.

The unavailability of a deferment, however, does not prejudice the rights of a mineral claimant. To the extent that the land is open

to mineral entry, a claimant would still have the right to go out onto the land and perform assessment work such as would protect him from adverse claims by third-parties. As regards those claims embraced by withdrawals, there is no possibility of the initiation of new adverse claims by third-parties, and so long as notices of intention to hold the claim were annually filed as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2769, 43 U.S.C. § 1744 (1976), there can be little doubt that, should a Federal court reverse a determination of invalidity, the failure to actually perform assessment work would not independently serve as a predicate for invalidating the claim.

In conclusion, we hold that upon the final determination by this Board that a claim is invalid, and absent an intervening decision of a Federal court contrary thereto, no deferment of annual assessment work may be granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

FREDERICK FISHMAN
Administrative Judge

APPEALS OF ALLIED DRILLING, INC.

IBCA-1242-1-79 & IBCA-1250-2-79

Decided *September 12, 1980*

Appeals denied.

Contract No. 14-08-0001-17706, Geological Survey.

1. Contracts: Disputes and Remedies: Termination for Default: Generally

Where a contract specifies the complement and standard for drilling equipment to be furnished, neither the preaward survey of appellant's equipment, nor the commencement of performance with incomplete and admittedly noncompliance equipment is deemed a waiver of the contract requirement, and a default termination after issuance of a "cure notice" is upheld upon the failure of the contractor to provide equipment as specified in the contract.

APPEARANCES: Larry Durkan, President, Allied Drilling, Inc., Santa Rosa, California, for Appellant; John S. McMunn, Department Counsel, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

These appeals result from the default termination of appellant's contract for drilling approximately 130 holes in various Western States for the purpose of securing earth heat-flow data. The work was to be performed pursuant to delivery orders issued by the Government

within the performance period of 12 months, with each order specifying the number and location of specific wells to be drilled. The contract specified payment to be made at unit prices in the schedule for the mobilization and demobilization of equipment, equipment rental and, personnel costs. The estimated cost for the work to be performed was $271,750. The indefinite quantity contract for services to drill the wells was awarded on Oct. 31, 1978. The contract provided as follows in Article D.4 and D.5 for the equipment and specifications therefor to be used:

D.4. *Drilling Plant Rental*: The Government shall pay the Contractor an hourly rental rate for a completely equipped drilling plant subject to the following conditions and specification: a) The drill shall be equivalent to a Mayhew 1000 with 500 cfm x 50 psi or larger air compressor and 5 x 6 or larger duplex slush pump, mounted on a 4 x 6 or 6 x 6 truck or ample GVWR to carry 500 feet of 2⅞" drill pipe loaded in side racks; b) The water truck shall consist of a 4 x 6 or [*sic*] 6 x 6, 2000-gallon capacity self-loading truck with pipe racks, mud storage, water tank heater, tow bar hitch and shall be of ample GVWR to carry 500 feet of 2⅞" drill pipe plus 1500 pounds of mud and 2000 gallons of water; c) The service pick-up shall be ¾ ton rated, equipped with tow bar and shall include equipment for arc welding plus gas welding and cutting; d) The drilling plant shall also be equipped with all necessary tools, hoses, pumps, drill pipe, drill collars, subs, fishing tools, core barrels, lubricants and spare parts as required to maintain the equipment in proper working order; e) The rental rate shall include an experienced driller and two experienced helpers and shall apply to all operations such as drilling, moving between sites, coring, running casing, grouting, fishing, logging, etc., as long as the drill crew is on site and available for work.

D.5. *High-Pressure Air Compressor and Downhold Hammer Rental*: The Government shall pay the Contractor an hourly rental rate for a completely equipped high-pressure air compressor and downhole hammer subject to the following conditions and specifications: a) The air compressor shall have a minimum manufacturer's rating of 750 cfm at 250 psi, and shall be truck mounted (if not mounted on the drill truck) and shall include all necessary hoses, accessories, spare parts, fuel and lubricants to maintain the compressor in proper working order; b) The downhole hammer shall be rated for 200 psi input with bit sizes of 5" to 5½"; c) The Contractor shall also furnish a water/soap-injection pump capable of pumping sufficient fluid to control dust and water infiltration; d) The hourly rental rate shall apply whenever the compressor and hammer are on site and available for use; e) Time spent transporting the compressor between drill sites shall be chargeable at the hourly rental rate as shown in Section D, Item 3.

Background

Mr. Moses, the contracting officer's representative (hereinafter COR), made a preaward survey of appellant's equipment with which the contract work was to be performed. He found the drilling rig, air compressor, downhole hammer, and water truck did not meet the contract specifications (Tr. 9). Despite the deficiencies noted in the equipment he was shown, he recommended award of the contract to Allied based on the assurances that equipment in compliance with the

contract was on order or arrangements were being made to secure an adequate complement of equipment (Tr. 15). Delivery order No. 1 was issued on Nov. 6, 1978, calling for the drilling of 10 to 20 holes in California. The first site was Boonville, California, where mobilization of equipment was commenced by appellant on Nov. 7, 1978. Appellant's Exhibit A consists of the daily drilling logs from Nov. 7 to Nov. 15, 1978. These logs show for November 7 that 5 feet of conductor was set and the afternoon was spent repairing the water truck which had broken down on the way to the site and then bringing a load of water to the site. The log for November 8 shows drilling from 8 a.m. to 12 p.m. to a depth of 300 feet and the afternoon making repairs to equipment. The November 9 log shows reaming to the previous depth for 2 hours, then drilling for 3 hours to 370 feet when the water supply ran out around 1 p.m. and the air compressor broke down, requiring the remainder of the day for repairs. The log for November 10 shows only equipment repairs and waiting on a part needed for repairs. There is no log sheet for Saturday, November 11. The log for Sunday, November 12 indicates appellant's personnel went to the site to continue repairs and encountered heavy rain, necessitating the drilling rig to be moved to bottom of the hill. Work indicated on the log for November 13 consisted of work on drilling rig, installation of cement pump, reaming of previously drilled hole and then 1 hour or more of drilling to 440 feet. At this point the water supply ran out and a hydraulic hose broke requiring shutdown. The November 14 log shows 1 hour of servicing and repair of drilling rig, and day long effort to ream the hole without success due to repeated loss of circulation. On November 15, there was 1½ hours of service and repair work and 7 hours effort to run 1 and ¼ pipe in hole washing down with mud pump. The location was then abandoned and the equipment moved to the bottom of the hill.

Concurrent with the above efforts to drill the first well, the COR was present at the site, noting the absence of some of the equipment required by the contract, and discussing with appellant's personnel the need for such equipment. Mr. Durkan, appellant's President, was not at the drilling site. The COR noted in his testimony (Tr. 17–27) that the water truck was not present on the first day of mobilization, and that upon appearance of the truck the next day, it was not the Kenworth truck he had been shown during his preaward survey, but a smaller one without the capacity for carrying pipe, drilling mud and other equipment. He noted that there was insufficient pipe at the site to comply with the 1,000 feet contract specified drilling capability. Appellant did not have the subs (threaded adaptors) to hook up the Government's core barrel or the customary float sub fitting just above the drill bit. He noted the lack of spare parts and welding

equipment. The COR drove into a nearby community and rented the required subs, charging them to the Government's account. Appellant's testimony contradicts that of the COR respecting the availability of parts, including the subs. However, the testimony of an on-the-site observer of the work, witnessing the breakdowns, and attempted repairs, and the difficulties encountered in the work, must be given greater weight in this instance. Had the required equipment and spare parts been available at the site as claimed by appellant, there is little to account for only 9 hours of drilling and 6 hours of reaming during an 8-day period as shown on the logs.

By letter of Nov. 14, 1978 (AF–4), the contracting officer sent appellant a listing of equipment and personnel deficiencies and advised appellant that the deficiencies must be cured within 10 days, or the Government may terminate the contract for default under General Provision No. 11. A telephone record of a conversation between the contracting officer and Mr. Durkan dated December 1 (AF–10) indicated that Mr. Durkan acknowledged receipt of the "cure letter" on Nov. 24, 1978, and advised that he needed until December 5 to be ready to drill at the next site. By telegrams dated December 1 and December 4 (AF–11 and 12), the contracting officer directed appellant to mobilize at Potter Valley by 9 a.m. December 6 for drilling the next hole. He directed Mr. Durkan to have written evidence of ownership or management control of all equipment and materials necessary to perform in accordance with the contract.

The COR and contracting officer went to Potter Valley on the morning of December 6 and determined that appellant had not brought contract specified equipment to the site. The COR testified that the drilling rig with the 3½ inch pipe supplied had only 750 feet drilling capacity rather than the contract specified 1,000 feet. The water truck lacked the specified capacity and did not have a loading pump, pipe racks, or tank heater. Additionally, there was no high pressure air compressor or proper sized downhole hammer. The only hammer was 6½ inches in diameter which he advised would require more air and larger pipe (Tr. 34–37). The two Government representatives left the site to return to their motel accommodations. There, Mr. and Mrs. Durkan came to the room to advise that the critically needed air compressor was either on its way or already at the site (Mr. Durkan: Tr. 149). Mr. Keeton, an employee of appellant, confirmed by letter dated Dec. 13, 1978, that the equipment assembled at Potter Valley was about the same as they had at Boonville except that missing items included an air compressor, downhole hammer, fishing tools and subs (AF–20).

The contracting officer sent a telegram on Dec. 6, 1978, terminating appellant's right to continue performance for default, and a con-

firming termination letter was sent on Dec. 7, 1978. A "redi-letter" dated Jan. 26, 1979, from Mr. Durkan to the contracting officer advises that a necessary part of his drilling rig was delivered to him on Jan. 8, 1979, and that his equipment and 1,500 feet of drill pipe makes his plant job ready (GE–26).

The gravaman of appellant's arguments is that he was simply supplying equipment and personnel to drill holes for the Government under the contract, and the fact that the COR permitted him to start work drilling the first hole with equipment that did not meet the contract requirements constituted an acceptance of substitute equipment for that required in the contract.

Subsequent to the default termination, the Government did award a replacement contract to another contractor and according to the COR, had drilled over 100 holes by the time of the hearing, at a cost of approximately $45,000 more than the cost would have been under appellant's contract (Tr. 40). It is noted that this averages over 10 holes per month, which is a rate unlikely to be achieved with excessive downtime for repairs or waiting for the acquisition of needed spare parts or drilling rig components. No reprocurement costs have been assessed against appellant by the Government.

Findings

The issue presented in this case is whether the Government did accept the use of substitute equipment in lieu of that specified in the contract, and thereby improperly default terminate appellant's contract. Appellant relies primarily on the preaward survey by the COR and the use of his equipment at Boonville in an unsuccessful attempt to drill one hole with a target depth of 750 feet. He has not attempted to show that the equipment he supplied at the Boonville or Potter Valley sites was in compliance with the contract specifications, or that the complement of equipment was complete. The above specifications for the drilling equipment to be furnished establish the minimum performance standards for the specified equipment and the minimum accessories required to be furnished by the contractor. The depth of the holes to be drilled was specified to be up to 1,000 feet. Bidders on the contract are responsible for determining whether the equipment they have available to them will meet these minimum standards. There is nothing in the record to indicate that either the COR or the contracting officer ever indicated to appellant that equipment not meeting these standards would be acceptable for use on the contract. It is not disputed that the Kenworth water truck that the COR was shown during the preaward survey was not made available for use at either site, but that a smaller truck was furnished. Uncontroverted testimony of the COR establishes the fact that the drilling depth capability of equipment varies di-

rectly with the size of the hole and the amount of air supply, *i.e.*, the smaller the drill pipe and the greater the air supply, the greater the depth of drilling capability (Tr. 34–36). The contractor must be presumed to know the proper coordination of components of his drilling equipment to know whether he can achieve the contract requirements.

Inasmuch as the contract did not require success by appellant in drilling to the target depth at sites chosen by the Government, the failure of appellant to achieve the target depth is not relevant. However, to the extent that the operations at Boonville demonstrated that appellant's equipment was incomplete or failed to meet the minimal contract specifications, these operations are significant. On Nov. 8, 1978, appellant achieved 300 feet in 4 hours of continuous drilling. Thereafter, no significant amount of drilling was accomplished before an inadequate amount of water supply or a breakdown in equipment forced the shutdown of equipment. An inference may be drawn that if the water truck had had ample capacity and adequate equipment and spare parts been available, more continuous drilling would have been possible, thereby enhancing the probability that the target depth would have been reached.

Appellant's claim that the Government accepted the equipment that was admitted to be in noncompliance with the specifications in appellant's questioning of the COR (Tr. 173–75) is not supported by the evidence. By memorandum of Oct. 5, 1978, the COR pointed out the deficiencies of appellant's equipment, but concluded that it might be possible for appellant to provide sufficient equipment to meet the specifications (GE–25). The COR's daily record of events at the Boonville site reveal a continued concern expressed to appellant's personnel that a full complement of contract required equipment was not available (AF–5). By letter to the contracting officer dated Nov. 13, 1978, he detailed the specific failures to supply equipment meeting contract requirements and concluded, "Please note that Larry Durkan has repeatedly told me that he will have whatever is required—however he is long on promises and short on performance" (AF–3).

Therefore, contrary to the claim that the Government accepted the use of noncompliant equipment, the record shows continuous efforts by the Government to require compliant equipment to be supplied. These efforts were intensified when the experiences at Boonville demonstrated that appellant's equipment did not meet contract requirements. Absent a showing of a waiver of the contract specifications, the Government had a right to insist on full compliance with the contract specifications. This, it did by the "cure letter" dated Nov. 14, 1978, and the telegrams requiring appel-

lant to mobilize at Potter Valley and to provide evidence that it owned or had management control of the specified equipment. Mr. Durkan's visit to the COR and contracting officer at the motel room after the appointed hour for mobilization at Potter Valley on Dec. 6, 1978, confirms that the critical component of a high pressure air compressor was not available at the site. Appellant's employee, Mr. Keeton, confirms that the equipment assembled at Potter Valley lacked the air compressor, downhole hammer, fishing tools, and subs. Lacking the critical components of the drilling rig of an air compressor and downhole hammer, appellant clearly failed to mobilize at Potter Valley the contract required equipment necessary to begin drilling operations. Consequently, we find that appellant was in default of the contract requirement to provide the specified equipment.

During the hearing on Sept. 10 and 11, 1979, in San Francisco, appellant requested a continuance until such time as he could have the case presented by legal counsel (Tr. 75). Ruling on the motion was deferred, and the hearing was concluded with Mr. Durkan representing appellant in accordance with his written notice to the Board dated May 22, 1979. The Board's rules, which were furnished appellant upon docketing of his appeal, do not require that appellant be represented by counsel. Rule 4.100(e)(4) requires the interpretation of our rules so as to secure a just and inexpensive determination of appeals without unnecessary delay. Hearing procedures are made as informal as possible in order that legal counsel is not essential if appellant desires to present his appeal without counsel. In this instance, with the concurrence of Government counsel, appellant was given every assistance by the hearing officer in the presentation of his case. Consultation between Mr. Durkan and his wife was permitted at every stage of the hearing to assure a fair and complete presentation of appellant's case. Mr. Durkan's presentation showed a full knowledge of the facts leading up to this appeal. He was provided with written notice of the hearing date, and took no exception. The parties assembled with their witnesses at the appointed time for hearing with the customary inconvenience and difficulties inherent in coordinating schedules and travel arrangements. The site of the hearing was chosen to afford appellant a minimum of expenditures to present his case. Appellant's only reason given for desiring not to proceed without an attorney was his perceived inadequacy to properly present his case. Under these circumstances, we find no basis for granting of the motion for a continuance, and adopt the transcript of the concluded hearing as the official record of the hearing. Mr. Durkan made his election to represent appellant many months before the hearing and failed to

provide sufficient cause to permit a change in his decision after the hearing was proceeding.

At the hearing, Mr. Durkan repeatedly made reference to the claim that appellant should be paid for the work that it did at Boonville. The Government responded that an invoice for such work had been requested in order that the contracting officer could make a determination as to whether the Government had any liability to make any payments to appellant. The Government indicated that it had no knowledge of any demand for payment and appellant failed to produce any evidence of such a demand. No evidence was offered at the hearing respecting the basis of appellant's claim for payment or any justification for the total of $15,000 he claimed to be due. Our jurisdiction is appellate in nature, and there having been no claim presented to or decided by the contracting officer respecting money claimed to be due appellant, we find that the Board is without jurisdiction to consider any monetary claim under these appeals.

Conclusion

We have found that the termination for default of appellant's contract was proper because of the failure to provide the contract specified equipment; and therefore, the appeals are denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEALS OF YALE INDUSTRIAL TRUCKS, BALTIMORE/WASHINGTON, INC.

IBCA-1287-7-79 & IBCA-1293-8-79

Decided *September 12, 1980*

Contract No. 68-03-6064, Environmental Protection Agency.

Appeals denied.

1. Contracts: Disputes and Remedies: Termination for Default: Generally

The contracting officer's decision to terminate for default a fixed price contract for the delivery of a single forked lift truck for a stated price is deemed proper where the appellant failed to timely deliver the truck to the specified delivery point by the specified contract delivery date.

2. Contracts: Disputes and Remedies: Termination for Default: Excess Costs

Where the Government presented evidence of immediate need for replacement of a forked lift truck in need of repairs and presenting a safety hazard, the Government's action to reprocure the truck from the third lowest bidder who had the only immediately available truck complying with the contract standards is deemed proper and consistent with the duty to mitigate the reprocurement costs.

APPEARANCES: Paralee White, Attorney at Law, Cohen & White, Washington, D.C., for Appellant; Richard Anderson, Government Counsel, En-

vironmental Protection Agency, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

By this appeal, the appellant seeks to overturn the default termination of its contract for failure to make timely delivery of a forklift truck, and to avoid the payment of the assessment of excess reprocurement costs. The parties agreed on a lengthy stipulation of facts and there is little disagreement on the factual circumstances leading up to the Government's action to terminate the contract for default. Appellant contends that its interpretation of the contract delivery provision as meaning that delivery occurred upon delivery to the carrier should be accepted and that the Government erred in its reprocurement by failing to mitigate the excess costs.

Background

Appellant was the successful bidder on an invitation for bids for one electric forklift truck and was awarded a fixed-price contract on Feb. 22, 1979, for $18,258. The contract contained the following delivery requirements:

1. Delivery under any contract resulting from this Invitation/Proposal shall be made within sixty (60) days after receipt of award of contract. Accelerated delivery is acceptable to the Government at no additional cost.

2. Delivery shall be made F.O.B. Destination to the following facility:

Environmental Protection Agency
Motor Vehicle Emission Laboratory
2565 Plymouth Road
Ann Arbor, MI 48105

NOTE: The term "F.O.B. Destination to" means on board the conveyance of carrier free of expense to the Government at a specified delivery point where the consignee's facility is located. The term "facility", as used herein, means plant, warehouse, store, lot or other location to which shipment can be made.

Appellant received the contract on Feb. 26, 1979, which resulted in a scheduled delivery date of Apr. 27, 1979. On Apr. 24, 1979, the contracting officer called Mr. Walter Gruzs of Yale Industrial Trucks to determine the status of the truck and was advised that shipment would occur on Apr. 26 or 27. On Apr. 30, 1979, appellant's representative, Mr. Ostergard, called the contracting officer to advise that the shipment would be delayed because of a problem, but there was a chance that the truck could arrive at the destination of Ann Arbor, Michigan, that day or, in any event, by May 4. The Government's Ann Arbor facility received the truck battery on April 30 and the battery charger on May 3, 1979. These two items were list priced at approximately $4,500 and were included in the total contract price.

On May 16 the contracting officer telephoned Mr. Gruzs to advise that the failure to deliver the truck was a potential default termination situation and was told that the shipment had been misdirected by a computerized shipment procedure

and that it was being tracked manually. On May 18, 1979, the contracting officer sent appellant a notice to show cause as to why the contract should not be terminated under the Termination for Default provision of the contract. Appellant received the show cause notice on or about May 21, and a representative sent a telegram on May 30 to the contracting officer advising that the shipment had been misdirected and was rescheduled for shipment between June 4 and June 11, 1979. On June 14, the contracting officer telephoned appellant to propose a revised delivery date of June 15 or appellant would risk termination. Appellant was unable to ship at this time because of a missing trail wheel, but after investigating this problem, Mr. Gruzs sent a telegram to the Government advising that the delivery date will be on or before June 25, 1979. On June 18 the contracting officer telephoned appellant to state that a modification would be issued pursuant to the telegram notification of delivery on or before June 25, 1979.

On June 18 the contracting officer contacted the second lowest bidder responding to the invitation for bids and concluded that the quoted delivery schedule of 60–90 days was not acceptable. On June 22, the contracting officer sent appellant a telegram stating that the contract would be terminated for default if complete delivery has not been made by 12:01 a.m. on June 26, 1979. The promised contract modification was dated June 18, 1979, and required that delivery shall be made no later than June 25, 1979.

On June 22, 1979, the contracting officer contacted the third lowest bidder responding to the invitation for bids which was Clarklift. He learned that Clarklift had the required truck, battery, and charger on hand and was willing to deliver at its quoted price of $20,923. On the same date, the contracting officer talked with the requiring facility in Ann Arbor to verify the continuing need for the truck and was requested to make an award to the next lowest bidder to avoid the time required for a new advertised procurement action.

Appellant shipped the forklift truck from Greenville, North Carolina, on June 24, 1979, and by telegram on June 25, advised the contracting officer of the delivery. On June 26 the contracting officer verified that the truck had not been received in Ann Arbor, and sent a telegram that afternoon notifying appellant that the contract was terminated for default for failure to deliver by June 25, 1979. Earlier that day, the contracting officer had received a telegram from Mr. Gruzs stating the truck had been shipped on June 24, 1979, and giving the model and serial number of the truck.

After sending the default notice to appellant, the contracting officer sent a telegram to Clarklift offering a contract for the forklift truck at its original bid price, which offer was accepted by telegram on June 27.

Appellant's forklift truck was received in Ann Arbor on July 6, 1979, and acceptance was refused. The Clarklift truck was received and accepted on July 13, 1979, and paid for by check on Aug. 8, 1979. Prior to receipt of either truck, appellant's representatives protested the default termination in telephone conversations and urged acceptance of appellant's previously shipped truck. The Government refused to reconsider the termination action or to accept appellant's truck. On July 23, 1979, the contracting officer notified appellant that the battery and battery charger would not be accepted and requested appellant to remove them from the Ann Arbor facility. By letter dated Aug. 16, 1979, the contracting officer assessed $2,665 in excess procurement costs against appellant and later increased the assessment by $91.29 to reflect the ½ percent increased prompt payment discount the Government would have been entitled to from appellant if it had paid appellant within 20 calendar days.

Discussion and Findings of Fact

Appellant contends that the contract term "delivery" was reasonably interpreted to mean delivery to the shipper, and that the default termination was improper because delivery to the shipper had occurred before the contract delivery date. At the hearing and in the briefs, appellant sought to show this interpretation of "delivery" to be the customary use in the trucking industry. Appellant contends that its communications with the contracting officer were all consistent with the interpretation that "delivery" occurred upon the date the forklift truck was given over to the shipper, and that the contracting officer accepted this interpretation by failure to object or to give a different interpretation to appellant.

Appellant's attempt to give a different meaning to the term "delivery" must fail because of the lack of ambiguity in the express contract terms defining "delivery" and "F.O.B. Destination to." The delivery provisions set forth above clearly provides that delivery shall be made F.O.B. destination at Ann Arbor, Michigan. Appellant incorrectly states the premise in its prehearing brief that no definition of delivery is included in the contract. Not only is the term "delivery" defined to be F.O.B. destination at Ann Arbor, Michigan, but also, the term "F.O.B. Destination to" is stated to mean "on board the conveyance of carrier free of expense to the Government *at a specified delivery point* where the consignee's facility is located." (Italics added.) Delivery was required to be made within 60 days at Ann Arbor, Michigan, according to the clear and unchallenged language of the contract. Appellant's arguments relating to its reasonable interpretation and the custom and usage in the trucking industry become relevant only upon a showing of an ambiguity in the contract language. The arguments are not made rele-

vant by ignoring the provisions of paragraph 2 of the delivery provision stating where delivery is to be made.

The meaning of F.O.B. destination is a well established part of the law. The Uniform Commercial Code, Section 2–319 states:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> * * * * *
>
> (b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2–503).

Appellant does not and cannot contend that, in the face of the express language of the contract as to delivery, the forklift truck belonged to the Government at the time that it was delivered into the hands of the shipper. The carrier was the agent of the seller and the risk of loss or misdirection of the shipment falls on the seller or the shipper, not the Government. If delivery to the Government was completed upon delivery of the truck to the shipper by appellant, then the earlier shipment alleged to have been made in May would have completed appellant's obligations under the contract, even though the alleged shipment never arrived at Ann Arbor. Appellant's failure to rely on the May shipment and failure to recover the misdirected shipment and secure its proper delivery during the ensuing month before termination is not explained in the record. We find the contract language for delivery to be clear and unambiguous in requiring delivery to occur at Ann Arbor, Michigan, on or before June 25, 1979. The parties agree that the forklift truck was not delivered to Ann Arbor by that date. Appellant's failure to deliver on or before the fixed date in the contract permitted the Government to invoke its rights under the Termination for Default provision of the contract. Therefore, we find the action to terminate appellant's right to perform under the contract for default to be proper.

Appellant also contends that the reprocurement cost assessment is not reasonable because the Government (1) failed to consider appellant's lower priced, available unit as a source of supply, (2) failed to utilize items already at point of receipt in the reprocurement, (3) failed to elicit any competition in the reprocurement, and (4) failed to negotiate the price with the sole offeror.

The first contention that the Government failed to consider appellant's lower priced available unit in its reprocurement action appears specious under the facts of this case. According to the stipulated facts, there was no way the Government could be assured of the existence of an available unit from appellant at the time of reprocurement. As stated earlier, appellant informed the Government on Apr. 30, 1979, that despite a problem that existed there was a chance that the truck would

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arrive in Ann Arbor that same day, or in any event, by Friday, May 4. During the following month, it developed that the truck had been misdirected and never arrived at Ann Arbor. Therefore it appears that the contracting officer had no greater assurances that a forklift truck shipped by appellant in June would be received at the destination than he had, on prior assurances, that the truck would arrive by Friday, May 4. Essentially, the argument that the Government had a duty to mitigate damages by considering the purchase of appellant's forklift truck in transit would amount to a further extension of the contract performance period. (*See Si Lite, Inc.*, GSBCA No. 2442 (May 7, 1968), 68-1 BCA 7032.) Appellant cannot impute a duty for the Government to purchase its forklift truck on reprocurement in order to mitigate damages, especially under circumstances where the Government could not be certain of the current availability of the truck.

Appellant contends that the Government failed to mitigate the reprocurement cost assessment by utilizing the already delivered battery and battery charger, which were compatible with other manufacturer's forklift trucks according to testimony offered at the hearing. Appellant's witness, Mr. Gruzs, testified that appellant did not inform the Government prior to reprocurement that the battery and charger could be used with trucks of other manufacturers. The cases relied on by appellant in support of the contention that the Government should have utilized appellant's battery and charger to reduce reprocurement costs involved contracts for multiple numbers of identical deliverable items. Appellant's contract called for a single item at a single unit price. The forklift truck as described in the specifications required that a battery and charger be included, but there were no separate prices for these items. The delivery of portions of a single deliverable unit cannot be seen to transform the contract into one calling for multiple units, under which completed items may be required to be accepted at the contract price prior to reprocurement. No evidence was offered as to the ultimate disposition by appellant of the rejected forklift truck with its battery and charger, so that no determination can be made as to whether appellant suffered any actual damages despite the assessment of reprocurement costs. The forklift truck with battery and charger was essentially a standard commercial item, not manufactured especially for the Government to its specifications. With the stipulated facts showing circumstances that appellant had considerable difficulty in meeting its delivery commitments, a prompt resale of the rejected truck can be presumed.

Appellant argues that the failure of the Government to seek competition on the reprocurement contract shows a failure to demonstrate the reasonableness of its reprocurement action. No proof was offered to

show that competition would likely result in a lower price than was paid in the Government's reprocurement action. The contracting officer testified that he had confirmed the continued and pressing need for the new forklift truck (Tr. 73–74). He verified that the using facility was concerned about the safety of the truck being replaced, that it needed repairs and that the unreliability of the existing equipment resulted in manually loading or unloading of materials. In *Century Tool Co., Inc.*, GSBCA No. 3999 (Mar. 3, 1976), 76–1 BCA 11,850, on which appellant relies to show that the Government has the burden of showing the reprocurement was reasonable, the Board accepted the ample precedent that this burden is lighter when a critical, verifiable need for the items in question is present. In that case, the facts did not support such a determination, but here the Government has provided evidence that added cost of repairs, a safety hazard, and manual effort would be involved during any period of readvertising and award of a reprocurement contract. Under these circumstances, we find the Government's action to award the reprocurement contract to the third lowest bidder on the original competitive procurement to be reasonable, because of the immediate availability of a forklift truck meeting the contract specifications.

Finally, appellant contends that the Government's failure to negotiate the price to be paid to the reprocurement contractor was unreasonable. Citing *The Lutz Co.*, GSBCA No. 2173 (Dec. 15, 1967), 68–1 BCA 6762, appellant urges that the Government should have sought an even lower price on the reprocurement contract by negotiating with Clarklift. *The Lutz Co.* case involved the Government's election to seek a reprocurement source by negotiated procurement methods and the acceptance of the lowest bid without further negotiations. The case is distinguishable from the instant case in that *The Lutz Co.* case would require the Government to be bound by the election to resort to a negotiated reprocurement by endeavoring to negotiate an even lower price with the low bidder, whereas, in the instant case, the Government had not made the election to reprocure by negotiation. Rather, the firm bid of the only bidder with available equipment was selected from the original advertised competition. The Government was given 2-working days by Clarklift to procure at the original bid price or to abandon the right to reprocure at the original bid price. The bid of Clarklift was a competitive bid under the original advertised procurement, and the award was made on the same basis as the original award to appellant, *i.e.*, to the lowest responsible and responsive bidder. Just as negotiation would have been inappropriate with appellant after it won the initial competition, Clarklift had no obligation to enter negotiations with the Government to lower its bid price.

The brief acceptance period allowed by Clarklift between June 22 and June 26 for acceptance of Clarklift's original bid does not indicate that a Government election to negotiate would have resulted in anything other than a higher price.

Having found that appellant's claims that the Government failed to mitigate damages are without merit, we find that the Government did take reasonable steps to mitigate the reprocurement costs.

Conclusion

We find that appellant was in default in the failure to deliver by the time specified in the contract, rendering the Government's action to terminate its right to proceed to be proper. Also, we find that the Government's reprocurement action was justified under the circumstances and that such action accorded with the duty to mitigate reprocurement costs. Therefore, the appeals are denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

HAYDEN & HAYDEN COAL CO.

2 IBSMA 238

Decided *September 12, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Mar. 27, 1980, order of Administrative Law Judge Joseph E. McGuire denying a motion to reconsider that part of his Feb. 19, 1980, decision vacating violation No. 1 of Cessation Order No. 79-2-72-1 (Docket No. NXO-2-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings—Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally

When a cessation order indicates that it is being issued both because the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm and because there has been a failure to abate a violation listed in a notice of violation, a finding of either of those grounds is sufficient to sustain the cessation order.

APPEARANCES: Carol S. Nickle, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Background

On Aug. 29, 1979, an inspector with the Office of Surface Mining Reclamation and Enforcement (OSM) conducted an inspection of the George's Branch surface mine of Hayden & Hayden Coal Co. (Hay-

den) in Breathitt County, Kentucky, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1] He issued Notice of Violation No. 79–2–72–1 charging seven violations of the Act and initial program regulations. Hayden filed an application for review of the notice and an application for temporary relief. Subsequently, the inspector returned to the minesite on Oct. 11, 1979, and issued Cessation Order No. 79–2–72–1 for failure to abate the violations listed in the notice.

Following a hearing on Oct. 25, 1979, the Administrative Law Judge issued a decision on Feb. 15, 1980. He affirmed violation Nos. 1–7 of the notice, and affirmed the cessation order as it related to violation Nos. 2–7, but vacated the order as it applied to violation No. 1.[2]

On Mar. 14, 1980, OSM filed a motion with the Administrative Law Judge seeking reconsideration of his disposition of violation No. 1. He denied the motion by order dated Mar. 27, 1980. OSM filed a timely notice of appeal from that order and filed a brief in support of its appeal. Hayden did not file a brief.

Discussion

The Administrative Law Judge based his denial of OSM's motion to reconsider on OSM's failure to prove that violation No. 1 of the cessation order caused or could reasonably be expected to cause significant, imminent environmental harm. The cessation order in this case contained the following language on page 2 (Exh. R–18):

Check Appropriate Box:

☐ The condition, practice or violation is creating an imminent danger to the health or safety of the public.

☐ The condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

☐ The permittee or operator has failed to abate violation(s) No. *1 through* 7 included in Notice of Violation No. *79–2–72–1* * * * within the time for abatement originally fixed or subsequently extended.

The inspector checked both the second and third boxes. The Administrative Law Judge stated in his Mar. 27, 1980, order: "Once having advised applicant of the grounds upon which the cessation order was being issued [by checking the boxes], even if the inspector inadvertently checked the second box, basic fairness compels that the respondent be required to adduce evidence in support of both bases in order to prevail."

OSM argues that the Administrative Laws Judge erred in that determination. It explains that the inspector checked the second box because violation Nos. 2–7 of the notice were causing or could be expected to cause significant, imminent environmental harm. The third

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] Violation No. 1 of Notice of Violation No 79–2–72–1 charged a "[f]ailure to have signs identifying the mine area displayed at all points of access to the permit area from public roads and highways" in violation of 30 CFR 715.12(b).

box was checked because none of the seven violations had been abated. However, that interpretation was not clear from the face of the cessation order. The inspector could have entered a short explanatory statement on the cessation order. He did not. Despite the lack of explanation, Hayden did not object to—nor was it prejudiced by—the checking of the two boxes.

[1] While the inspector admitted that violation No. 1 was not causing nor was it expected to cause significant, imminent environmental harm (Tr. 74), the record supports a finding that violation No. 1 was not abated at the time the cessation order was issued (Tr. 49). That finding alone is sufficient to sustain the issuance of a cessation order as it relates to violation No. 1. 30 U.S.C. § 1271(a)(3) (Supp. I 1977); 30 CFR 722.13. The Administrative Law Judge erred in ruling that OSM had to prove both significant, imminent environmental harm and a failure to abate in order to prevail. Proof of either of those grounds would support the issuance of a cessation order.

Basic fairness did not require that OSM prove both grounds in this case in order to have the cessation order sustained, but merely required that those violations that were contested and for which there was competent evidence be upheld. Therefore, the lack of evidence to support a finding of significant, imminent environmental harm did not serve to relieve Hayden from its proven failure to abate violation No. 1.

Violation No. 1 of Notice of Violation No. 79-2-72-1 was not abated on Oct. 11, 1979, and Cessation Order No. 79-2-72-1, as it related to that violation, was properly issued. The order appealed from is reversed.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

CRAVAT COAL CO., INC.

2 IBSMA 249

Decided *September 23, 1980*

Consolidated appeals by Cravat Coal Co., Inc., from the decisions of Administrative Law Judge Sheldon L. Shepherd upholding violation No. 2 of Cessation Order No. C 79-3-13-2 (Docket No. IN 0-7-R, Jan. 25, 1980) and granting temporary relief from prepayment of a civil penalty assessment (Docket No. IN 0-16-P, Feb. 21, 1980).

IBSMA 80-30 (Docket No. IN 0-7-R) affirmed; IBSMA 80-35 (Docket No. IN 0-16-P) reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

All surface water drainage from the area disturbed by surface mining and reclamation operations must comply with the

effluent limitations of 30 CFR 715.17(a) even if it originates as contaminated ground water from previously mined areas.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally—Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Generally

43 CFR 4.1260 does not authorize temporary relief from the requirement of 43 CFR 4.1152(b) that a proposed civil penalty be paid into escrow pending a final determination on the merits of the case.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

30 CFR 723.14(a) does not authorize an Administrative Law Judge to reduce the number of days for which a civil penalty may be assessed when the obligation to abate the violation has not been suspended.

APPEARANCES: Paul F. Benson, Esq., Cadiz, Ohio, for Cravat Coal Co., Inc.; John C. McDowell, Esq., Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Walton D. Morris, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

Roger Dolzani, an authorized representative of the Secretary of the Interior, inspected Cravat Coal Co., Inc.'s (Cravat's) mine in Tuscarawas County, Ohio, on Sept. 6, 1979, in accordance with the surface Mining Control and Reclamation Act of 1977 (Act) [1] and 30 CFR 721.11. He noticed water seeping from the highwall north of the minesite entrance, just inside the disturbed area. A field test of this water below the mine's eastern permit boundary showed it did not conform to the effluent limitations set forth in 30 CFR 715.17(a).[2] The inspector therefore issued Notice of Violation No. 79–III–13–6.[3] Violation No. 2 of this notice of violation stated that the "discharge from the area disturbed * * * fails to meet the effluent limitations" and that the remedial action required was to "treat the water from the seep so that the discharge from the permit area meets the effluent limits of sect. 715.17(a)."[4] The abatement period was set for Oct. 1, 1979; later it was extended four times to Dec. 5, 1979, the maximum period allowed under

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] The field tests showed a pH of 5 and iron at more than 10 mg/1 (Resp. Exh. 3). Subsequent laboratory analyses resulted in readings of 3.04 pH and 148 mg/1 iron (Resp. Exhs. 4 and 5). The effluent limitations in 30 CFR 715.17(a) require pH to be within the range of 6.0–9.0 and fix 7 mg/1 as the maximum allowable total iron.

[3] Violation No. 1 of Notice of Violation No. 79–III–13–6 was issued for "failure to direct all surface drainage from the disturbed [sic] through sediment ponds before leaving the permit area. The permittee has removed the sediment pond before water quality and revegetation requirements have been met."

[4] Violation No. 2 of the original notice of violation was modified to include another seep discovered later "just north of and adjacent to the minesite entrance in the Portion to Which the Notice Applies (violation #2)" (Resp. Exh. 7, p. 4).

sec. 521(a)(3) of the Act.[5] On Dec. 6, 1979, Cessation Order No. 79–3–13–2 was issued for failure to abate the violations cited in the original notice of violation.[6]

Cravat filed an application for review of violation No. 2 of the cessation order on Jan. 7, 1980.[7] It filed an application for temporary relief on January 10. A hearing was held in Pittsburgh on both applications on Jan. 22, 1980, and a decision was issued on Jan. 25, 1980. Cravat filed a notice of appeal from this decision with the Board on Feb. 26, 1980,[8] and a brief on Mar. 28, 1980.

Meanwhile, on Feb. 11, 1980, Cravat filed an "application" for review of a proposed civil penalty assessment of $22,500 it received for the cessation order on Jan. 11, 1980, and an application for temporary relief from the requirement[9] that full payment of the proposed assessment be placed in escrow pending final determination of the assessment. These applications were also consolidated for purpose of a decision issued Feb. 21, 1980. Cravat filed a "notice of appeal of civil penalty" from this decision with the Board on Mar. 12, 1980, and a memorandum in support of its appeal on Mar. 24, 1980. The Board treated this "notice" as a petition for discretionary review in accordance with 43 CFR 4.1270, and granted the petition on Apr. 9, 1980.[10]

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[5] 30 U.S.C. 1271(a)(3) (Supp. I 1977). These extensions were all granted in order to give Cravat more time to get State of Ohio approval for a modified drainage plan (Tr. 30). Representatives of Cravat and Ohio disagreed on where a new sedimentation pond should be located. (*See* n. 3, *supra*.) In mid-October Ohio indicated informally it would not approve Cravat's suggested location; this indication was repeated in mid-November (Tr. 68). In late November, after learning from the OSM inspector that the period for abatement in the NOV could not be extended beyond 90 days, Cravat submitted a proposed modification of its permit to Ohio which incorporated Cravat's preferred location for the sedimentation pond, and proceeded to implement that proposal (Tr. 31, 68, 76, 77). Cravat learned at the January 22 hearing that its proposed modification had not been approved (Tr. 46).

[6] Violation No. 2 of the cessation order listed the "seep about 100 ft. north of minesite entrance" and the "seep adjacent to and north of the minesite entrance" as operations to be ceased immediately (Resp. Exh. 9).

When the OSM inspector returned on Dec. 6, 1979, he found that the drainage from the seep had been directed via a ditch to an existing sedimentation pond but that "[t]he discharge from that pond and off the minesite or off the permit area, both were still failing the effluent limitations" (Tr. 31). The seep drainage cited in the notice of violation field tested at pH 3.20, iron 10 mg +/1 (Resp. Exh. 7, p. 2). A sample of this drainage was taken from the same place as on Sept. 6 (Tr. 33). Laboratory analysis of this sample showed pH 3.35, iron 185 mg/1 (Resp. Exh. 8; Tr. 35).

The inspector therefore listed, as violation No. 2 of the cessation order, failure to abate violation No. 2 of Notice of Violation No. 79–III–13–6 and described as "operations" to be ceased immediately: "Discharge off the permit area of water coming from the disturbed area that is not within the effluent limits of sec. 715.17(a): (1) seep about 100 ft. north of minesite entrance; (2) seep adjacent to and north of the minesite entrance." (*See* n. 4, *supra*.) As affirmative obligations the inspector wrote: "Install, operate, and maintain treatment facilities so that all surface drainage from the disturbed area meets the effluent limits of sec. 715.17(a) before leaving the permit area."

Because "[a]pproximately 2 acres of drainage area in the north portion of the permit still would not be passed through the existing pond, since the ditch [was] not extended that far" (Resp. Exh. 7, p. 3), the inspector included violation No. 1 in the cessation order for failure to abate violation No. 1 of the notice of violation. (*See* n. 3, *supra*.)

[7] Cravat's application for review stated that violation No. 1 of the cessation order, issued for failure to abate violation No. 1 of the notice of violation, had been vacated by OSM.

[8] The appeal was docketed as IBSMA 80–30.

[9] 43 CFR 4.1152(b)(1).

[10] This petition was docketed as IBSMA 80–35.

On Apr. 11, 1980, the Office of Surface Mining Reclamation and Enforcement (OSM) filed a motion requesting that the Board consolidate Cravat's two appeals and permit OSM to file a joint brief. The Board granted this motion on Apr. 14, 1980. OSM filed its brief on May 28, 1980.

Discussion and Conclusions

[1] In his Jan. 25, 1980, decision the Administrative Law Judge concluded that although the water which created the condition that was the basis for violation No. 2 originated as contaminated ground water from previously mined areas it was surface water drainage from a disturbed area [11] that must comply with the effluent limitations of 30 CFR 715.17(a).[12] This conclusion is in accordance with the regulations. As the Administrative Law Judge noted, the definition of surface water [13] does not distinguish between sources of water. And 30 CFR 715.17(a) provides: "*All* surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond * * * before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area has met the water quality requirements of this section." (Italics added.) It provides further: "*Discharges from areas disturbed* by surface coal mining and reclamation operations *must meet* * * * the following numerical effluent limitations." (Italics added.) Passing all surface drainage from a disturbed area through a sedimentation pond is the means required to achieve compliance with the requirement that discharges from a disturbed area must meet the effluent limitations. These limitations apply to all discharges from a disturbed area, irrespective of source, whether or not they have been passed through a sedimentation pond or series of sedimentation ponds. Cravat did not treat the water flowing from the seep on its disturbed area to comply with the water quality requirements of sec. 715.17(a) before it left the permit area.[14] Accordingly, we affirm the Administrative Law Judge's Jan. 25, 1980, decision.[15]

[11] Tr. 13–14, 38–39, 43–45.

[12] "I, therefore, conclude that the water in question was surface drainage which was discharged from an area disturbed by surface coal mining and reclamation operations and that the same exceeded the effluent limitations in both total iron and pH limitations. I further find that violation No. 2 of Notice of Violation No. 79–III–13–6 was properly issued. Pursuant to the provisions of Section 521(a)(3) of the Act, Cessation Order No. 79–3–13–2 was properly issued inasmuch as the notice of violation had not been abated within the 90-day maximum permitted by the statute and regulations." Jan. 25, 1980, decision in IN 0–7–R, at 3.

[13] "Surface water means water, either flowing or standing, *on the surface of the earth*." (Italics added.) 30 CFR 710.5. This definition remained unchanged after comments on the proposed initial program regulations. *See* 42 FR 44928 (Sept. 7, 1977); 42 FR 62641, comment 3 (Dec. 13, 1977).

[14] *See* nn. 2 and 6, *supra*.

[15] It is possible that the U.S District Court for the District of Columbia, in accordance with a remand in *In Re: Surface Mining Regulation Litigation*, Nos. 78–2190, 78–2191, and 78–2192 (D.C. Cir. May 2, 1980), may hold that the Department must amend 30 CFR 715.17(a)

(Continued)

This application of sec. 715.17(a) is consistent with the preamble and introductory paragraph to sec. 715.17. The objective of the water quality and other requirements of 30 CFR 715.17 stated in the preamble "is to have the permittee research and understand the hydrologic balance in the affected area as well as to understand the effect of mining on that balance so that operations are planned and conducted to minimize disturbances both on- and off-site." [16] Specifically, "the permittee must plan operations to control ground water quality and flow." [17] The introductory paragraph to 30 CFR 715.17 requires a permittee to "plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site." The definition of hydrologic balance in 30 CFR 710.5, as well as the introductory paragraph to sec. 715.17, make it clear that water quality is one of the factors a permittee must take into account in planning and conducting the operation and reclamation.

Cravat neither planned its operations to control ground water quality nor conducted its operations so as to minimize water pollution. It knew the area where it proposed to conduct surface mining operations had been previously deep mined.[18] It knew about the specific seep that was later cited in the notice of violation before it began its operations and knew that it was part of the hydrologic system of the area.[19] It did not do anything about the seep because it felt it was not responsible for it; [20] rather, it followed the coal seam that was the course of the seep as it conducted its operations.[21]

We cannot approve the Feb. 21, 1980, decision excusing prepayment of and reducing the proposed civil penalty based on Cravat's violation of 30 CFR 715.17(a), however. In that decision the Administrative Law Judge wrote at page 3:

> This case arose under the enforcement provisions of Section 521 of the Act. Temporary relief was sought under Section 525 of the Act which permits the Secretary to "grant temporary relief from any notice or order issued under section 521 of this title." And application for temporary relief from payment into escrow of the sum of $22,500 would also seem to be within the scope of 43 CFR 4.1260 * * *. The cases cited by the respondent are distinguishable (*Blackhawk Mining Co., Inc.*, 1 IBSMA 215 * * * which cited *C & K Coal Co.*, 1 IBSMA 118 * * *). Neither of those

(Continued)
to include variances contained in regulations promulgated by the U.S. Environmental Protestion Agency under the Federal Water Pollution Control Act Amendments of 1972, Oct. 18, 1972, 86 Stat. 816, 844, *as amended* by the Clean Water Act of 1977, Dec. 27, 1977, 91 Stat. 1566, 1582–86, 1590, 33 U.S.C. § 1311 (Supp. I 1977). In this case, however, we may apply 30 CFR 715.17(a) as it reads now and read at the time of the enforcement action under review.

[16] 42 FR 62649 (Dec. 13, 1977).

[17] *Id.*

[18] Tr. 64, 66–67.

[19] Tr. 81–82.

[20] Tr. 74.

[21] Tr. 82–83.

cases involved an application for temporary relief, and neither involved an unreasonable delay by a third party which contributed to the failure to abate.

[2] We hold that 43 CFR 4.1260 does not authorize temporary relief from the requirement of 43 CFR 4.1152(b) that a proposed civil penalty be paid into escrow pending a final determination on the merits of the case. 43 CFR 4.1260 states specifically that "[t]hese regulations contain the procedures for seeking temporary relief in section 525 review proceedings under the Act." Sec. 525(c) authorizes temporary relief, under limited conditions, "from any notice or order issued under section 521 of this title." Civil penalties, however, are imposed under sec. 518 of the Act, and that section provides for their administrative review. Neither that section nor any provision of the regulations provides for temporary relief from the prepayment requirement of sec. 518(c), implemented in 43 CFR 4.1152(b)(1).

In his Feb. 21, 1980, decision the Administrative Law Judge also reduced the number of days for which a civil penalty could be assessed from 46 to 16 and accordingly reduced the proposed civil penalty to $12,000. He did so on the basis of the provision in 30 CFR 723.14 that assessment of the mandatory civil penalty of $750 for each day an unabated violation continues after a cessation order has been issued "shall not be made for any period that the obligation to abate *is* suspended." (Italics added.) "[I]t would seem intolerable," he wrote, "to penalize the petitioner for delays occasioned by a co-enforcer of the regulations, that is, the State of Ohio * * *. I, therefore, find that the duty to abate *should have been* suspended for the days *from mid-October 1979 to mid-November 1979* which was apparently wasted by the State of Ohio." [22] (Italics added.)

[3] There are at least two problems with this reasoning. First, under 30 CFR 723.14(a) a mandatory civil penalty is assessed—as it was in this case—for the period a violation "remains unabated *following expiration of the abatement period* in the notice of violation" (italics added), not a period before that expiration date (*e.g.*, mid-October to mid-November). It is improper to subtract pre-expiration days from the postexpiration period. Second, although it may be unfortunate or even poor judgment that the duty to abate was not suspended by OSM, it in fact was not suspended. Nor is it necessary for OSM to do so. The fact that the State of Ohio did not tell Cravat what would be acceptable to it [23] does not relieve Cravat of its obligation to comply with what is required by a Federal notice of violation or cessation order. *Kaiser Steel Corp.*, 2 IBSMA 158, 162, 87

[22] Feb. 21, 1980, decision in IN 0-16-P, at 3.

[23] We note that Cravat did not formally seek a permit modification from Ohio until late November and that Ohio had twice before then indicated its probable position on the proposed modification. (*See* n. 5, *supra.*)

I.D. 324, 326 (1980); *Little Sandy Coal Sales*, 2 IBSMA 25, 30, 87 I.D. 61, 64 (1980); *Eastover Mining Co.*, 2 IBSMA 5, 8, 87 I.D. 9, 11 (1980); *Cedar Coal Co.*, 1 IBSMA 145, 153, 86 I.D. 250, 255 (1979). It was therefore inappropriate under 30 CFR 723.14(a) for the Administrative Law Judge to reduce the number of days for which a civil penalty could be assessed from 46 to 16 for the reasons he did.

However, the regulations governing civil penalties during the initial program have since been amended, among other things, to limit the number of days for which a $750-day penalty may be assessed for failure to abate a violation to 30.[24] Accordingly, we must remand this case for a determination of what civil penalty is appropriate under these amended regulations.

We reverse the order in the Administrative Law Judge's Feb. 21, 1980, decision granting temporary relief from prepayment of the civil penalty and reducing the number of days for which a civil penalty may be assessed to 16.

The decision in IN 0–7–R is affirmed; the decision in IN 0–16–P is reversed and remanded for a determination of the appropriate civil penalty.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

[24] 30 CFR 723.15(b)(2), 45 FR 58780, 58784 (Sept. 4, 1980).

APPEAL OF PAUG-VIK, INC., LTD.

5 ANCAB 59

Decided *September 24, 1980*

Motion for reconsideration of an order of the Alaska Native Claims Appeal Board dated May 1, 1980, granted.

Order affirmed in part and modified.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Remand

Where a matter on appeal has been remanded to the Bureau of Land Management for a specific determination, the Board retains jurisdiction over the question of whether or not such a determination has been rendered moot by subsequent actions of the party.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Definitions: Federal Installation

An agreement between selecting Native corporations and a Federal agency, on lands actually used by the Federal agency, cannot be enforced in lieu of a § 3(e) determination by the Bureau of Land Management to compel conveyance to the Native corporations in accord with the agreement. ANCSA by clear language in § 3(e) mandates a Secretarial determination. While the Secretary may delegate, he may not be compelled to relinquish his statutory duty to third parties.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement

Act: Definitions: Federal Installation
Where the required § 3(e) determination is crucial to conveyance, where the affected Federal agency and all affected Native corporations agree on the identification of lands actually used by the agency, where the record discloses no inconsistency between the agreement and § 3(e), where the determination has already been delayed for a significant period of time by the lack of implementing regulations and the date of publication of final regulations cannot be ascertained, the Bureau of Land Management may make a § 3(e) determination, relying on the parties' agreement for factual data, in the absence of final regulatory guidelines.

APPEARANCES: John A. Smith, Esq., and Robert Spitzfaden, Esq., Smith & Gruening, for Paug-Vik, Inc., Ltd.; Martha Mills, Esq., Office of the Attorney General, for the State of Alaska; Major Gordon Wilder, Esq., Hq. 21 ABG/JA, for the United States Air Force; John M. Allen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Donald Boberick, Esq., Office of the Regional Counsel, for the Federal Aviation Administration; Elizabeth Johnston, Esq., and Thomas S. Gingras, Esq., for Bristol Bay Native Corporation; Harland W. Davis, Esq., for Bristol Bay Borough; George G. Moen, for the U.S. Army Corps of Engineers.

OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD

PROCEDURAL BACKGROUND

In a decision of July 5, 1978, *Appeal of Paug-Vik, Inc., Ltd.*, 3 ANCAB 49, 85 I.D. 229 (1978) [VLS 77-2], the Board remanded this appeal to the Bureau of Land Management (BLM) for a determination pursuant to § 3(e) of the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. § 1602 (e) (1976)), whether the lands in dispute were within the smallest practicable tract enclosing land actually used in connection with the administration of a Federal installation; *i.e.*, the Air Force.

On Sept. 18, 1979, the BLM published proposed rulemaking setting forth procedures to be used in implementing § 3(e) of ANCSA (44 FR 54254, Sept. 18, 1979). This rulemaking sets guidelines for the type of determination for which the Board has remanded this appeal to the BLM. Final rulemaking will be the first promulgated on § 3(e) determinations under ANCSA; no other such rulemaking exists. Comments were required to be submitted by Nov. 19, 1979. As of the present date, final rulemaking has not been published in the *Federal Register* and the date of such publication is unknown.

On Apr. 11, 1980, the Appellant, Paug-Vik, Inc., Ltd. (hereinafter Paug-Vik), filed with the Board an agreement between Paug-Vik, the United States Air Force, and Bristol Bay Native Corp., which purports to be a negotiated resolution of the § 3(e) determination for which the Board had remanded the appeal to the BLM. The agreement describes certain lands as the small-

est practicable tracts enclosing lands actually used in connection with the administration of the Air Force installation at King Salmon. The agreement also recites certain understandings with regard to highway rights-of-way in the State of Alaska, access to gravel pits outside the "smallest practicable tract" by the Air Force, distribution of monies paid into escrow by various parties as payment for gravel extraction and liability for use of an ordnance disposal site.

Paug-Vik moved the Board for an order conveying title to the surface estate of the lands which are the subject of the agreement. The Board on May 1, 1980, denied Paug-Vik's motion on the grounds that BLM had not made a § 3(e) determination and an order to convey would be premature. Paug-Vik requested reconsideration.

Paug-Vik asserts that all issues as to title to the lands in dispute have been settled by their § 3(e) agreement. Paug-Vik seeks an order compelling BLM to convey the surface estate to them, and the subsurface to Bristol Bay Native Corp., in those lands not described in the agreement as actually used by the Air Force.

BLM objects on the grounds that the Board lacks jurisdiction because the appeal is currently on remand to them for a § 3(e) determination; BLM is not a party to the agreement and the agreement cannot be substituted for a Secretarial determination pursuant to § 3(e); and, until regulations implementing § 3(e) have been published in final form, BLM cannot make such a determination.

The issues raised are: Where an agreement, between a Federal agency using lands and Native corporations with ANCSA selection rights, purports to determine which lands are "actually used" by the agency within the meaning of § 3(e) of ANCSA, is BLM precluded from adopting the determination set forth in the agreement, in lieu of an independent BLM determination? Second, where proposed regulations implementing § 3(e) of ANCSA have been published for comment, is BLM precluded from making § 3(e) determinations, by any method, pending publication of final rulemaking?

The Board concludes that BLM is not precluded from accepting the § 3(e) determination set forth in the agreement, and may do so prior to publication of final regulations.

DISCUSSION

The lands from which Native corporations may select are public lands as this term is specially defined in ANCSA.

Sec. 3(e) of ANCSA defines public lands for purposes of the Act:

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.

As the Board noted in *Appeal of Seldovia Native Association, Inc.*,

1 ANCAB 65, 78, 83 I.D. 461 (1976) [VLS 75–3]:

Generally, the term "public lands" is used to describe such lands as are subject to sale or other disposal under general law. *Newhall* v. *Sanger*, 92 U.S. 761 (1875). The term refers to the general public domain, unappropriated land, land belonging to the United States which is subject to sale or other disposal under the general land laws and not reserved or held back for any special governmental or public purpose. *Ben J. Boschetto*, 21 IBLA 193 (1975). It does not include lands to which rights have attached and become vested through full compliance with applicable land laws. *Holz* v. *Lyles*, 280 Ala. 321, 195 So. 2d 807 (1967). It is however, a term of varying senses, depending largely on the context in which it appears and the special circumstances of the case. *Kindred* v. *Union Pacific Railroad Co.*, 225 U.S. 582 (1912).

83 I.D. 461, 467–468.

The definition of public lands contained in § 3(e) is broader and more inclusive than the generally accepted meanings referenced above, for it is not limited to unappropriated land which is subject to disposal under the general land laws and which is not reserved for governmental or other public purposes.

The definition in § 3(e) encompasses lands which are *not* subject to disposal under the general land laws, because they *are* reserved for government use. The expanded definition in § 3(e) makes reserved Federal land "public land" and therefore available for Native selection if not being actually used by a Federal agency. This broad definition in § 3(e) operates only to make land available for conveyance to Native corporations under ANCSA; it does not operate to make lands available for disposal under the general public land laws.

The Act does not specify procedures to be followed in making § 3(e) determinations. As noted, procedural regulations have not been published.

Paug-Vik argues that the Air Force, Bristol Bay Native Corp., and itself, being the using agency, Native regional corporation, and selecting Native village corporation, are the only possible grantees of the land in question and therefore the only possible parties with an interest in the § 3(e) determination addressed by their agreement; since they are in agreement on lands actually used by the Air Force, further determination by the Secretary is unnecessary. Therefore, it is Paug-Vik's position that the Board should accept the agreement in lieu of a § 3(e) determination, thereby eliminating the need for a remand, and order BLM to convey according to the terms of the agreement.

BLM, on the other hand, argues first that the Board lacks jurisdiction to consider this issue, because the appeal is presently on remand to BLM for a § 3(e) determination. Even if the Board had jurisdiction, BLM cannot make a § 3(e) determination in the period between publication of proposed and final rulemaking on procedures for § 3(e) determinations.

The Board cannot accept the

positions of either Paug-Vik or BLM.

[1] First, the Board has jurisdiction. Where a matter on appeal has been remanded to BLM for a specific determination, the Board necessarily retains jurisdiction over the question of whether or not such a determination has been rendered moot by subsequent actions of the parties.

Following BLM's approach, the Board would lose all control over an appeal until BLM acted on a remand. Theoretically, even if the parties advised the Board that they had settled the issue on remand, the Board would lack jurisdiction to dismiss the appeal. Such a result would be impracticable. While the Board would not attempt to substitute its judgment for BLM's on a matter remanded to BLM for findings, the Board clearly retains jurisdiction to rule on the question presented by Paug-Vik; *i.e.*, whether the parties have, by agreement, settled all disputed § 3(e) issues so that a § 3(e) determination by BLM is superfluous.

[2] Second, the agreement between Paug-Vik, Bristol Bay Regional Corp., and the Air Force cannot be enforced in lieu of a § 3(e) determination by BLM to compel conveyance to Paug-Vik in accord with the agreement. ANCSA by clear language in § 3(e) mandates a Secretarial determination. While the Secretary may delegate, as he has to BLM, he may not be compelled to relinquish his statutory duty to third parties.

Third, the Board finds no authority for the proposition that BLM may not make a § 3(e) determination in this appeal in the interim between publication of proposed regulations and final adoption of rulemaking. BLM cited no authority. Judicial interpretations of rulemaking requirements illustrate only the general rules of law relevant to this issue.

In general, agencies must have standards—for reasons of fairness, to encourage the security of transactions, and to maintain the independence of the agencies. *City of Lawrence, Mass.* v. *CAB*, 343 F.2d 583, 587 (1st Cir. 1965).

Agencies may, by statute, be given the power to make rules. "As a matter of law, it is not necessary for Congress to formulate each rule and regulation in an area of highly technical activities. These duties and responsibilities are placed upon administrative agencies competent to administer in the public interest within their respective spheres of operation." *United States* v. *Clayton*, 198 F. Supp. 18, 21 (W. D. La. 1961). *See also United States* v. *Grimaud*, 220 U.S. 506, 31 S. Ct. 480, 483, 55 L. Ed. 563 (1911).

Rules with substantial impact on those regulated, such that they change existing rights and obligations, are subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1976); *Dimaren* v. *Immigration and Naturalization Service*, 398 F. Supp. 556, 559 (S.D.N.Y. 1974). Where rules are subject to the Ad-

ministrative Procedure Act, *supra*, then such regulations are void unless published in strict conformity with the Act. *Kelly* v. *U.S. Department of the Interior*, 339 F. Supp. 1095, 1101 (E.D. Calif. 1972).

Rulemaking requirements of the Administrative Procedure Act, *supra*, may not be avoided by making rules in the course of adjudicative proceedings. *NLRB* v. *Wyman-Gordon Co.*, 89 S. Ct. 1426, 1429, 394 U.S. 759, 22 L. Ed. 709 (1969).

However, administrative matters are committed to agency discretion. The choice between rulemaking and individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. *NLRB* v. *Q-T Shoe Manufacturing Co.*, 409 F.2d 1247, 1252 (3d Cir. 1969).

None of these rulings are directly in point. BLM does not seek to avoid rulemaking or to circumvent proper rulemaking procedures. The precise issue raised by this appeal is whether, upon publication of proposed rulemaking, an agency is precluded from acting on a matter potentially affected by such rulemaking, until the regulations become final. Having published § 3(e) regulations for comment, must BLM refrain from making any determinations pursuant to § 3(e) until the final regulations are published—no matter how long this may take?

The Board thinks not.

In general, it is a prudent and reasonable policy to await publication of implementing regulations before attempting to make determinations required by ANCSA. However, several factors in this appeal outweigh that consideration.

ANCSA does not expressly mandate rulemaking; sec. 25 of the Act authorizes the Secretary to publish regulations as necessary. (43 U.S.C. § 1624 (1976).) The fact that the Secretary has not yet issued final regulations establishing procedures for § 3(e) determinations cannot be taken as a prohibition against action under that section.

Sec. 3(e) raises a threshold question in the administration of ANCSA, because it addresses the question of whether certain lands—those claimed to be actually used in connection with the administration of a Federal agency—are public lands within the unique definition of ANCSA, and therefore available for Native selection. To fulfill the statutory mandate of prompt conveyance in ANCSA, it seems imperative to make § 3(e) determinations in a timely manner. Nine years have elapsed since enactment of ANCSA, and § 3(e) regulations have not been published.

The only determination required is whether the lands in question are being "actually used" by a Federal agency—here, the Air Force—or whether the lands are "public lands" as defined in ANCSA and therefore available for Native selection. The Air Force and the only other potential grantees of the land—the selecting Native village and regional corporations—are in agreement on which lands are being "actually

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used." The appeal record indicates that the Air Force position has been approved by James F. Boatwright, Principal Deputy Assistant Secretary of the Air Force, Installations.

While BLM cannot be required to accept the parties' agreement on § 3(e) issues as the Secretary's determination, the agreement nonetheless is worthy of serious consideration by BLM as a source of information. Although the Air Force must justify its need for land, BLM obviously cannot determine which lands this agency, or any agency, actually uses without consulting it. Another probable source of information would be the selecting Native corporation, which could be expected to present objections, together with supporting data, if it disagreed with the agency's claimed use. The only beneficiary of a § 3(e) determination as contemplated by ANCSA must be a selecting Native corporation; as previously noted, § 3(e) determination as contemplated by ANCSA must be a selecting Native corporation; as previously noted, § 3(e) does not operate to release lands from use by Federal agencies and make them available for disposal under the general public land laws. The using agency and the affected Native corporations appear to be the only possible interested parties. Where they all agree on which lands the agency uses, BLM should be able to place strong reliance on their conclusions.

[3] Under these circumstances, where the required § 3(e) determination is crucial to conveyance, where the affected Federal agency and all affected Native corporations agree on the identification of lands actually used by the agency, where the record discloses no inconsistency between the agreement and § 3(e), where the determination has already been delayed for a significant period of time by the lack of implementing regulations and the date of publication of final regulations cannot be ascertained, the Board sees no reason why BLM should not make a § 3(e) determination, relying on the parties' agreement for factual data, in the absence of final regulatory guidelines.

The Interior Board of Land Appeals (IBLA) has held that BLM should suspend action on applications for disclaimers of interest under sec. 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1745 (1976), where no regulations had been issued. *Grace Cooley Coleman, Leota Ferrell*, 35 IBLA 236 (1978). This case is distinguishable from the present appeal. In *Coleman*, two applicants had filed for disclaimers of interest by the United States in land which both applicants claimed, as a means of removing a cloud on the title, under § 315 of FLPMA. No regulations had been issued to implement this section. The Director of BLM instructed the New Mexico State Director not to process the Coleman application until regulations were issued. Based on a legal opinion that title to the land was still in the

United States, the State Director issued decisions returning both applications. Thus, BLM acted against express instructions and the action taken had the effect of an adjudication rejecting the applicants' competing title claims, without opportunity for the applicants to present their cases fully, and without regulatory guidelines.

Finding that the disclaimer should not be processed until regulations had been formulated, IBLA stated, "It is possible that regulations when issued will specify the type of showings an applicant is to make to help the Department in making its title determination, and will prescribe the fact-finding and review procedures and standards." *Coleman, supra*, at 239.

The Board agrees with *Coleman* that an agency may not deny an application or adjudicate conflicting claims of title without regulations. However, in the present appeal, BLM is not asked to adjudicate conflicting interests. All the parties have agreed among themselves on the question of which lands were actually used by the Air Force within the meaning of § 3(e), and have advised BLM of their agreement.

Further, in the present appeal, the record discloses no instructions to BLM against § 3(e) determinations before rulemaking; indeed, BLM realty personnel were apparently working on a § 3(e) determination and agreed to postpone it, not for regulations but for negotiation of the agreement between the parties. (Memorandum of Mical E. Walker, Exhibit A, Paug-Vik Memorandum in Support of Motion for Reconsideration, June 3, 1980.)

BLM has filed a copy of a letter to Morris Thompson, President of the Alaska Federation of Natives, from the Solicitor, Leo Krulitz, acting for the Secretary. (BLM Brief, June 13, 1980.) The letter responds to a request by Mr. Thompson that "no binding actions which have a negative effect on Native land rights under Section 3(e) of the Alaska Native Claims Settlement Act should take place until final regulations on this issue have been promulgated." Mr. Krulitz replies that proposed regulations are being drafted and states, "With respect to your specific concerns, we do not intend to make any section 3(e) determinations prior to the issuance of final regulations."

There is no indication that this letter was communicated to BLM as an instruction, or published in any manner as Departmental policy. In any case, the specific concerns addressed—the possibility of actions with negative effect on Native land rights under § 3(e)—are not present in this appeal, where the affected Native corporations are the parties seeking a § 3(e) determination. Under these circumstances, the Board does not believe *Coleman* to be applicable.

The appellant has argued that BLM is estopped, by the representations of its realty specialist Mical Walker, from maintaining that a § 3(e) determination must await final § 3(e) regulations. Since the

Board here rejects BLM's position and finds that BLM may make a § 3(e) determination of lands involved in this appeal without awaiting final regulations, it is not necessary to reach the estoppel issue.

On reconsideration, the Board's order of May 1, 1980, which found that it would be premature to order BLM to convey lands without a § 3(e) determination, is affirmed. The Board further rules that BLM is not precluded from making a § 3(e) determination in this appeal before publication of final rulemaking on procedures for making § 3(e) determinations.

JUDITH M. BRADY
Chief Administrative Judge

CAPITOL FUELS, INC.

2 IBSMA 261

Decided *September 24, 1980*

Appeal by Capitol Fuels, Inc., from that part of the Jan. 22, 1980, decision of Administrative Law Judge Tom M. Allen upholding the violations of 30 CFR 715.12(b) and (e) alleged in Notices of Violation Nos. 79–I–86–9 and 79–I–86–11 and the violation of 30 CFR 715.17(a) alleged in Notice of Violation No. 79–I–86–19 (Docket No. CH 9–174–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

An OSM inspector who, after a reasonably diligent search, does not find a mine employee with some degree of management or supervisory authority and who is not asked for identification by other employees, may conduct an inspection without the prior presentation of credentials.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Sec. 521(a)(1) of the Act does not have effect during the initial regulatory program.

3. Surface Mining Control and Reclamation Act of 1977: Signs and Markers: Generally

Mine identification and blasting signs must be located as required by 30 CFR 715.12(b) and (e).

APPEARANCES: Thomas H. Vanderford IV, Esq., Pauley, Curry & Thaxton, Charleston, West Virginia, for Capitol Fuels, Inc.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by Capitol Fuels, Inc. (Capitol), on Feb. 19, 1980, from that part of a decision of the Hearings Division issued on Jan. 22, 1980, in Docket No. CH 9–174–R,[1] which upheld the violations

[1] An appeal filed by the Office of Surface Mining Reclamation and Enforcement was dismissed as not timely filed in accordance with 43 CFR 4.1271(b). *Capitol Fuels, Inc.* v. *OSM*, 2 IBSMA 43 (1980).

of 30 CFR 715.12 (b) and (e) described in Notices of Violation Nos. 79–I–86–9 and 79–I–86–11, and the violation of 30 CFR 715.17(a) described in Notice of Violation No. 79–I–86–19. For the reasons discussed below, we affirm that decision.

Factual and Procedural Background

On July 11, 1979, two inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited three adjacent surface coal mining and reclamation operations conducted by Capitol in Boone County, West Virginia, under State permits Nos. 56–72, 167–74, and 221–76. This inspection was made pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[2] The inspectors first went to the mine office common to the three operations, which they found to be closed. Next they went to the maintenance shop, where they asked several maintenance employees for the mine superintendent or a foreman. They were told that the superintendent was on vacation and that one or more of the foreman were somewhere on the minesites.

The inspectors then proceeded to inspect Capitol's operations and found several conditions that they determined were violations of the Department's initial program regulations. Near the end of the inspection, one inspector encountered Capitol's maintenance foreman, identified himself, and stated the purpose of his visit. The inspector then accompanied the former on a tour of the minesites to observe, generally, the violations previously found.

On July 12, 1979, OSM served Capitol with Notices of Violation Nos. 79–I–86–9, 79–I–86–10, and 79–I–86–11.[3] After laboratory analysis of a water sample taken during the July 11 inspection, Notice of Violation No. 79–I–86–19 was served on Capitol on July 19, 1979.[4]

Capitol applied to the Hearings Division on Aug. 3, 1979, for review of the notices. Following the Nov. 9, 1979, hearing, both parties submitted briefs to the Administrative Law Judge. Capitol argued that all of the notices should be vacated either because the inspectors failed to present their credentials prior to the inspection, in violation of 30

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[3] Notice of Violation No. 79–I–86–9, violations Nos. 1 and 2, stated (concerning permit No. 221–76):

"The person has failed to display at all points of access to the mine or permit area from public roads and highways, signs identifying the mine area [in violation of 30 CFR 715.12(b)].

* * * * * * *

"The person has failed to display signs or markers for 'blasting' at the edges of immediate blasting areas, or along access roads [in violation of 30 CFR 715.12(e)]."

These descriptions of violations appear, with insignificant differences in wording, in Notice of Violation No. 79–I–86–11 (concerning permit No. 56–72).

[4] A violation of 30 CFR 715.17(a) is described in this notice:

"Discharge from areas disturbed by surface mining and reclamation activities exceed the maximum allowable numerical limitations for suspended solids and iron. Qualified laboratory analysis indicates 536 mg/l suspended solids and 12.33 mg/l iron. The maximum allowable suspended solids is 70 mg/l and 7 mg/l iron."

The notice pertains to operations pursuant to State permit No. 221–76.

CFR 721.12(a), or because they failed to notify the State regulatory authority of their findings, in violation of sec. 521(a)(1) of the Act, 30 U.S.C. § 1271(a)(1) (Supp. I 1977). Capitol further argued that the signs required by 30 CFR 715.12 (b) and (e) were present at the time of the inspection; that the signs were located against fuel tanks approximately 100 feet from a common access road to the mining operations, due to construction where Capitol's access road and the public road intersected; and that no blasting signs were needed at the time of OSM's inspection because Capitol was not then blasting. Finally, Capitol argued that the drainage alleged to be in violation of 30 CFR 715.17(a) emanated from an abandoned deep mine and began before Capitol's operations.

The Administrative Law Judge held that "[a]lthough there may have been a technical violation of 30 CFR 721.12(a), which I do not concede, the second inspection cured the defect and there is absolutely no showing that the applicant was prejudiced by the actions of the inspector." Decision at 5. Capitol's argument based on sec. 521(a)(1) of the Act was dismissed as without merit on the basis of *Dayton Mining Co., Inc., & Plateau Mining, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979). *Id.* at 11. The Administrative Law Judge also found that "there was no evidence as to when the signs were removed or how long they had been removed [from the intersection of Capitol's access road and the public road] in order for the undersigned to determine that the signs were removed for a purely short temporary period," and, accordingly, held that "[t]he failure of [Capitol] to reset the signs further back in an area undisturbed by construction must be considered as a willful act * * * thereby causing a violation of 30 CFR 715.12 (b)." *Id.* at 6. The alleged violation of 30 CFR 715.17(a) was upheld on the authority of *Thunderbird Coal Corp.*, 1 IBSMA 85, 86 I.D. 38 (1979). *Id.* at 8–9.

Discussion and Conclusions

30 CFR 721.12(a) provides that "[a]uthorized representatives of the Secretary, without advance notice and upon presentation of appropriate credentials and without a search warrant, shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained are located." [5] In *Consolidation Coal Co.*, 1 IBSMA 273, 86 I.D. 523 (1979), *after remand*, 2 IBSMA 21, 87 I.D. 59 (1980), the Board discussed this requirement. In the first decision we stated:

> [A]n OSM inspector [need not] wait patiently at the perimeter of the permit area until an operator asks him for his credentials. [An inspector] may proceed to the minesite office or to the first available person on the minesite. * * * Presentation of credentials at the earliest practical opportunity and whenever re-

[5] This regulation correlates with sec. 517(b)(3) of the Act, 30 U.S.C. § 1267(b)(3) (Supp. I 1977).

quested to do so after each entry facilitates [the safe and orderly operation of mines] and does not impose undue burdens on OSM's inspection program.

1 IBSMA at 276–77, 86 I.D. at 525 (1979).

[1] The OSM inspectors conducted a reasonably diligent search for a Capitol official before beginning their inspection of the mining operations. Upon entering the permit areas, they first went to the mine office and found it closed. They then went to the maintenance shop where they encountered maintenance crewmen but no Capitol employee who appeared to have general management or supervisory responsibilities or who asked them to identify themselves.

The inspectors' determination to proceed with the inspection before finding a Capitol employee whose responsibilities might reasonably be taken to include overseeing their inspection activities was consistent with the provisions of 30 CFR 715.12(a). Inspectors should seek a a person with some degree of management or supervisory responsibility. In this case the inspectors identified themselves to such an employee at the first practical opportunity.[6] Moreover, they accompanied him on a second inspection, thus giving him an opportunity to see the areas where violations were found by the inspectors. Under these circumstances, the Board agrees with the ruling below that Capitol was not prejudiced by the inspection procedure followed.

[2] The Board also agrees with the Administrative Law Judge that the failure of the inspectors to notify the State regulatory authority of their findings in accordance with sec. 521(a)(1) of the Act[7] is controlled by *Dayton Mining Co., Inc., & Plateau, Inc., supra.* We held in that case that sec. 521(a)(1) does not have effect during the initial regulatory program. Capitol has not presented us with any reason to reconsider this decision and we decline to do so. *See Kaiser Steel Corp.*, 1 IBSMA 184 (1979); 2 IBSMA 158, 87 I.D. 324 (1980).

[3] The record further shows that Capitol failed to maintain mine identification and blasting signs as required by 30 CFR 715.12(b) and (e) at its mining operations.[8] Although Capitol offered testimony that these signs were located ap-

[6] We do not suggest that an OSM inspector may refuse to present credentials to other mine employees who might request them. An inspector's obligation under 30 CFR 715.12(a), however, is first to seek a mine employee with some management or supervisory authority.

[7] Sec. 512(a)(1) provides in pertinent part: "Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists."
Codified at 30 U.S.C. § 1271(a)(1) (Supp. I 1977).

[8] 30 CFR 715.12(b) provides, in pertinent part, that "[s]igns identifying the mine area shall be displayed *at all points of access to the permit area from public roads and highways.*" (Italics added.) 30 CFR 715.12(e) provides, in pertinent part, that "[s]igns reading 'Blasting Area' and explaining the blasting warning and all-clear signals *shall be posted at all entrances to the permit area.*" (Italics added.)

proximately 50 feet to the side of the access road to one of the permit areas,[9] that testimony was not responsive to OSM's charge that the signs were not located at the point of access to the two permit areas identified in Notices of Violation Nos. 79–I–86–9 and 79–I–86–11, as required by the regulations.[10] Moreover, Capitol's testimony was insufficient to rebut the fair inference from OSM's testimony that whatever signs may have existed on the date of inspection were not easily seen from this access road.[11]

Capitol's contention that it was not blasting at the time of OSM's inspection does not alter our conclusions above. Blasting signs serve to warn the public of continuing, not necessarily constant, blasting activities. While Capitol may not have been blasting during OSM's inspection, there is no evidence that Capitol had permanently discontinued blasting.

Although Capitol also appealed the Administrative Law Judge's ruling upholding a violation of the effluent limitations of 30 CFR 715.17(a), it presented no argument against that ruling. We see no reason to disturb the decision below on this issue. *See Cravat Coal Co., Inc.*, 2 IBSMA 249, 87 I.D. 416 (1980).

For the foregoing reasons that part of the Jan. 22, 1980, decision appealed from is affirmed.

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

[9] Tr. at 185, 187. The access road along which Capitol claims it had temporarily positioned its signs led to the mine operation under permit No. 221–76 (the subject of Notice of Violation No. 79–I–86–9).

[10] Nor did Capitol claim that there were mine identification or blasting signs for the operations under permit No. 56–72 (the subject of Notice of Violation No. 79–I–86–11) located along the access road to that permit area. *See* Tr. at 187–88.

[11] Tr. at 88–89, 95–96, 107.

HARDLY ABLE COAL CO.

2 IBSMA 270

Decided *September 24, 1980*

Appeal by Hardly Able Coal Co. from a Feb. 8, 1980, decision by Administrative Law Judge David Torbett in Docket No. NX 9–60–R, sustaining Cessation Order No. 79–II–5–14 issued for failure to abate a notice of violation issued for mining within 100 feet of a public road.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Violations of sec. 522(e) of the Act may be the subject of notices of violation under 30 CFR 722.12.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions—Surface Mining Control and Reclama-

tion Act of 1977: Variances and Exemptions: Generally

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly require remedial action of a reclamation nature in a notice of violation.

APPEARANCES: Roger W. Ayers, for Hardly Able Coal Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Jan. 11, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited the site of Hardly Able Coal Co.'s (Hardly Able) Wildcat Branch coal mine in Clay County, Kentucky. OSM issued to Hardly Able Notice of Violation No. 79–II–5–3, listing eight alleged violations of the Surface Mining Control and Reclamation Act of 1977 (Act)[1] and its implementing regulations, and Cessation Order No. 79–II–5–4, alleging one violation. During a follow-up inspection conducted on May 22, 1980, Hardly Able was issued Cessation Order No. 79–II–5–14 for failure to abate one of the violations listed in the notice, mining within 100 feet of a public road in violation of sec. 522(e)(4) of the Act (30 U.S.C. § 1272(e)(4) (Supp. I 1977)). Only this second cessation order is at issue in this appeal. Because we agree with the Administrative Law Judge's determination that this cessation order was properly issued, we affirm that decision.

Background

Hardly Able began operations at this site in February 1978 under a deep mine license from the Commonwealth of Kentucky. In August 1978 Kentucky issued Hardly Able a temporary authorization for surface disturbance related to a deep mine. This temporary authorization permitted the company to mine pending the issuance of a deep mining permit. Operations at the mine, however, were suspended in midsummer 1978 and had not been resumed at the time of the hearing.

The notice of violation issued to Hardly Able on Jan. 11, 1979, required the company to reclaim the area within 100 feet of the road. Cessation Order No. 79–II–5–14 for failure to abate was issued on May 22, 1979, and on May 30, 1979, Hardly Able requested a minesite hearing on that cessation order. On June 6, 1979, Hardly Able filed a letter with the Hearings Division that was treated as an application for review of the cessation order. At

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

the minesite hearing, held on June 18, 1979, Hardly Able informed OSM that it intended to seek a waiver of the 100-foot provision from the regulatory authority as permitted by sec. 522(e)(4) (30 U.S.C. § 1272(e)(4) (Supp. I 1977)).[2] On July 24, 1979, Hardly Able filed its application for a deep mine permit with the Commonwealth. The Administrative Law Judge held a hearing on Sept. 17, 1979, and issued a decision on Feb. 8, 1980, finding that the cessation order was properly issued. Kentucky granted Hardly Able a mining permit on or about Sept. 21, 1979, after the administrative hearing was held, but before the decision was issued. This permit allowed Hardly Able to mine within 100 feet of the road.

Hardly Able appealed the decision below on Feb. 29, 1980. Both parties submitted briefs. Both parties also responded to the Board's July 25, 1980, order requesting briefs on the applicability of *Eastover Mining Co.*, 2 IBSMA 70, 87 I.D. 172 (1980), to this case.

Discussion and Conclusions

[1] As an initial matter, the situation in this case is different from that in *Eastover*, *supra*. Unlike *Eastover*, there are no express statutory judicial remedies provided for the violation of the Act involved here. Also unlike *Eastover*, the Act expressly and specifically prohibits the activity for which the notice of violation was issued here. Further, the proscriptions of sec. 522(e) of the Act, made applicable during the initial program by 30 CFR 710.4, are clearly in the nature of performance standards. Such was not the case in *Eastover*. Violations of sec. 522(e) can therefore be the subject of notices of violation under 30 CFR 722.12 under the rationale in *Eastover*.

As for the enforcement action under review in this case, Hardly Able does not contest the validity of the initial notice of violation. Instead, Hardly Able argues that OSM did not require the proper remedial action and that therefore the company should not have received a cessation order for failing to abate in the manner prescribed in the notice. Hardly Able suggests that the notice should have been modified to list obtaining regulatory authority approval for mining within 100 feet of a public road as an appropriate alternative abatement.

Hardly Able did not seek review of the notice of violation, nor is there any evidence in the record that it sought a modification of the notice in order to change the required abatement to allow the company to obtain regulatory authority approval to mine within 100 feet of the road. The record indicates that Hardly Able did not inform OSM that it was seeking an exemption from the regulatory authority until the minesite hearing, approximately

[2] Hardly Able had begun the process of obtaining a waiver on Mar. 15, 1979, when it published notice of its intention to mine within 100 feet of a public road in a local newspaper in accordance with Kentucky law.

1 month after the cessation order was issued. The company had ample opportunity before the cessation order was issued to discuss the violation with OSM and to seek a modification of the required remedial action.

[2] The Board agrees with the conclusion reached below:

> The Act contemplates that a miner obtain permission from the regulatory authority to mine within 100 feet of a public road before the mining takes place. The ex post facto approval by the regulatory authority of mining within 100 feet of a county road generally defeats the purpose of the Act, that is, giving interested parties notice allowing them to protest before the actual mining takes place. To terminate a violation of this type by ex post facto approval of the regulatory authority would be the exception rather than the rule. Thus, the normal application of the Act would be for the inspector to require remedial action of a reclamation nature. In addition, the inspector has no particular reason to believe that the Applicant could obtain the required approval. Under all the facts and circumstances of the case, it is apparent that Inspector Shadoan ordered the proper remedial action.

Decision at 3. This conclusion conforms with the Board's decision in *Alabama By-Products Corp.*, 1 IBSMA 239, 246, 86 I.D. 446, 449 (1979), that regulatory authority approval of an exemption under the Act or regulations must be obtained prior to the start of any action to which the exemption applies.[3]

Because the notice of violation required the proper remedial action and because that action was not taken within the time given for abatement, Cessation Order No. 79–II–5–14 was properly issued for failure to abate that violation. The Hearings Division's decision of Feb. 8, 1980, is therefore affirmed. OSM's motion for oral argument is denied.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

[3] Thus the fact that approval was eventually received does not excuse the initial violation.

BLACK FOX MINING & DEVELOPMENT CORP.

2 IBSMA 277

Decided *September 24, 1980*

Appeal by Black Fox Mining & Development Corp. from a May 6, 1980, decision by Administrative Law Judge Sheldon L. Shepherd sustaining Notice of Violation No. 79–I–50–51 which charged a violation of 30 CFR 715.17(a) for failure to pass all surface drainage from a tipple operation through a sedimentation pond (Docket No. CH 0–50–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Permit area.*" During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

2. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

A violation of 30 CFR 715.17(a) for failure to pass surface drainage through a sedimentation pond may be established for a surface coal mining operation that is not required by a state to have a permit by showing that there is surface drainage, that it does not pass through a sedimentation pond, and that it leaves the disturbed area.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Black Fox Mining & Development Corp.; William Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Lynn Cox, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Background

On Nov. 13, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] an inspector from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected a tipple operation in Butler County, Pennsylvania, owned by Black Fox Mining & Development Corp. (Black Fox). He issued Notice of Violation No. 79–I–50–51, which charged Black Fox with failing "to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds prior to leaving the disturbed area" in violation of 30 CFR 715.17(a). On Nov. 23, 1979, Black Fox filed an application for review of the notice. Following a hearing held on Mar. 4, 1980, a decision was issued on May 6, 1980, sustaining the notice of violation. Black Fox filed a timely appeal and both parties have filed briefs.

Discussion

[1] On appeal Black Fox argues that the notice did not properly charge a violation of 30 CFR 715.17 (a) because the OSM inspector used the words "disturbed area" and the regulation relates only to "permit area."[2] OSM states that because the Commonwealth of Pennsylvania does not require tipple operations to have permits, the inspector used "disturbed area" rather than "permit area."[3] We find that a violation was properly charged. In *Bethle-*

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] 30 CFR 715.17(a) reads in pertinent part: "All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area."

[3] Black Fox does not dispute OSM's jurisdiction of its tipple operation.

hem Mines Corp., 2 IBSMA 215, 220, 87 I.D. 380, 383 (1980), involving a surface drainage violation at a rail loading facility in Butler County, Pennsylvania, we stated:

> The notice issued to Bethlehem stated that discharges were not passing through a pond before leaving the "disturbed area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

That holding is dispositive of this issue in this case.

[2] Black Fox also contends that even if a violation were properly charged, OSM failed to prove a violation because it did not show that surface drainage left the permit area. To establish a violation of 30 CFR 715.17(a) on a surface coal mining operation that is not required by a state to have a permit, OSM must show that there is surface drainage, that it does not pass through a sedimentation pond, and that the drainage leaves the disturbed area. OSM established through testimony and photographic evidence that there was surface drainage leaving the disturbed area that did not pass through a sedimentation pond.[4] Black Fox did not rebut this evidence.

[4] While there was some evidence that low-lying areas acted as natural sedimentation ponds (Exh. S–9; Tr. 33), the OSM inspector testified that there were no actual sedimentation ponds on the disturbed area and that over 50 percent of the drainage leaving the disturbed area did not pass through any of the low areas (Tr. 32).

The decision appealed from is affirmed.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

ROBERTS BROTHERS COAL CO., INC.

2 IBSMA 284

Decided *September 26, 1980*

Appeal by Roberts Brothers Coal Co., Inc., from a Nov. 19, 1979, decision by Administrative Law Judge William J. Truswell in Docket Nos. NX 9–20–R and NX 9–34–P upholding a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement for an alleged violation of the sedimentation control requirements of 30 CFR 715.17(a) and reducing the resulting civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface Coal Mining Operation." A tipple located 200–300 feet from a minesite is a "surface coal mining operation" with-

in the meaning of 30 CFR 700.5 when the tipple processes and stores all of the coal extracted from that mine, the mine is owned by the owners of the corporation owning the tipple, and the mine was leased in order to supply coal to the tipple.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

It is not error for an Administrative Law Judge to rely on hearsay evidence of chain of custody when the permittee challenges that evidence only by asserting that it is hearsay.

APPEARANCES: William D. Donan, Esq., Donan & Hunt, Madisonville, Kentucky, for Roberts Brothers Coal Co., Inc.; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On Oct. 27, 1978, while traveling along the access road to the Hopkins County, Kentucky, surface mine of Orbit Mining Co. (Orbit), Office of Surface Mining Reclamation and Enforcement (OSM) inspector Gail Kowaleski discovered a tipple operation of considerable size within 200 to 300 feet of Orbit's permit area. She visited this tipple, operated by Roberts Brothers Coal Co., Inc. (Roberts Bros.), and found no sedimentation control facilities. She discussed that situation with Mr. Bennie Roberts, one of the tipple's co-owners, and left without taking any enforcement action. Four days later she phoned Mr. Roberts to inform him that the tipple operation was subject to OSM regulation. Mr. Roberts assured her that the company could install sediment control devices within 30 days.

Upon her return to the site on Dec. 13, 1978, with two Environmental Protection Agency (EPA) officials, Ms. Kowaleski found that Roberts Bros. had constructed a berm to channel drainage directly into a nearby creek and had constructed no sedimentation ponds. The inspector issued Notice of Violation No. 78-II-21-12 to Roberts Bros. for failure to pass drainage through a sedimentation pond or series of ponds in violation of 30 CFR 715.17(a). Ms. Kowaleski terminated the notice on Mar. 7, 1979, after the company constructed two adequate sedimentation ponds, seeded and mulched the berm, and installed water treatment devices.

Roberts Bros. had filed an application for review of the notice of violation on Jan. 22, 1979. When OSM proposed a civil penalty of $3,500, Roberts Bros. requested an assessment conference, which resulted in a reduction of the proposed penalty to $900. Roberts Bros. then timely petitioned for review of the civil penalty assessment. At the

hearing, held on Aug. 31, 1979, Administrative Law Judge William J. Truswell consolidated the two proceedings for hearing and decision.

In his Nov. 19, 1979, decision the Administrative Law Judge found that Roberts Bros. operates the tipple, which covers approximately 20 acres in Hopkins County, Kentucky. Roberts Bros. is solely owned by two brothers, Messrs. Bennie and Paul Roberts (Tr. 68–9). The operation buys coal from suppliers and prepares, weighs, crushes, and otherwise processes it for loading and resale (Tr. 64). The tipple's suppliers are in the surrounding area, the most remote operating approximately 25 miles away (Answer to Interrogatory No. 5, dated July 27, 1979). More than 50 percent of the coal bought by the tipple comes from operators working mines located on land leased from Roberts Bros., from Bennie and Paul Roberts individually, or from other corporations owned by Bennie and Paul Roberts (Tr. 82–4; Answer to Interrogatory No. 4, dated July 27, 1979). A corporation owned by Bennie and Paul Roberts owns mining machinery which it lends to suppliers of the tipple whenever necessary. Roberts Bros. controls the amount of coal delivered to the tipple by deciding how much of its property to lease (Tr. 86). Although there is no enforceable contract provision requiring the lessee operators to sell their coal to Roberts Bros., Mr. Bennie Roberts anticipates that all the coal produced by these operators will ultimately be delivered to the tipple to enable it to meet its contract demands (Tr. 104–5).

The Roberts brothers, individually, acquired the property where the tipple now stands in 1968; this property included the area where Orbit conducted its operation (Tr. 90–2). In 1978 the brothers transferred the land where the tipple is located to Roberts Bros. Coal Co., Inc. Title to the Orbit land and its minerals remained in the brothers individually (Tr. 92–4); they leased the land to Orbit Mining Co., which is owned by Gene Quisenberry (Exh. R–8). Orbit contracted with Glen Larkins to operate the mine (Tr. 21–2). "Mr. Quisenberry is also the owner of Kirkwood Excavating, Inc. * * * which is currently [and for the past several years] the largest supplier of coal to applicant's coal processing facility" (Dec. 4). Roberts Bros. advanced money to Quisenberry over a period of years, as security for which the latter pledged certain mining machinery, some of which was used at Orbit (Tr. 74–5, 87). Orbit is about 200 to 300 feet from the tipple (Tr. 21). The access road included as part of Orbit's permit area runs through Roberts Bros.' tipple facility (Tr. 19–20). All of Orbit's coal was processed at the tipple (Dec. 4; Tr. 76–7, 60–2; Exh. R–12). A particular section of the tipple site was set aside for the storage of coal produced by Orbit.

Administrative Law Judge Truswell concluded that the tipple

operation was a "surface coal mining operation" within the meaning of 30 CFR 700.5, but reduced the civil penalty to $460. Roberts Bros. appealed this decision and briefs were filed by both parties.

Discussion and Conclusions

[1] Roberts Bros. contends the Administrative Law Judge erred in holding the tipple was a "surface coal mining operation" within the meaning of 30 CFR 700.5. To fall under the enforcement authority of OSM, the Roberts Bros. operation must fall within the definition of "surface coal mining operations" in the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1252(b) and (c) (Supp. I 1977), and 30 CFR 700.11 of the regulations. The Act (at 30 U.S.C. § 1291(28) (Supp. I 1977)) and the regulations (at 30 CFR 700.5) define that term in the same way:

Surface coal mining operations means—

(a) *Activities conducted on the surface of lands in connection with a surface coal mine* or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. *Such activities include* excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and *the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine-site,* * * * and

(b) *Areas upon which the activities described in paragraph (a) above occur or where those activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage* and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, *storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.* [Italics added.]

Subsec. (a) defines surface coal mining operations as those activities conducted in connection with a surface coal mine at or near the minesite. Subsec. (b) adds to the definition the areas upon which those activities occur and any adjacent land incidentally used for such activities and for other enumerated purposes. The facility is 200 to 30 feet from Orbit's permit area. Orbit's access road, which is part of its permit area, runs through the area upon which Roberts Bros.' facility is located. The processing and storing done by Roberts Bros. are obviously "at or near the [Orbit] mine site." 30 CFR 700.5.

This, however, is but one test under the definition. The activities must also be "conducted * * * in connection with a surface coal mine." Regarding the connection be-

tween minesite and tipple, the facts herein fall between those in *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), and those in *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980). In *Western* we held that the facility of a company which operated a river terminal and acted as a contract handler of coal, but which did not own, operate, or lease any coal mines, was not a surface mining operation as defined in 30 CFR 700.5. In *Drummond* we held that a coal processing facility owned by the same company that completely supplies that facility from seven mines also owned by it, which mines range from 9 to 30 miles away, is operated "in connection with" those mines under 30 CFR 700.5.

Here, Bennie and Paul Roberts are the sole owners of the processing facility through Roberts Bros. and of the land and coal leased by Orbit, the adjacent mine in question, individually. Orbit is owned by Gene Quisenberry, who also owns Kirkwood Excavating, Inc., the largest supplier of Roberts Bros.' processing facility. All of Orbit's coal was stored at and processed by the Roberts Bros. facility. Although their lessee operators are not legally required to sell coal to Roberts Bros., Bennie and Paul Roberts anticipate that all the coal produced by their lessees will be sold to their corporation; the contract requirements of their tipple determine how much of their coal property they lease.

While the connection between Roberts Bros. and its suppliers is informal, it is clearly symbiotic. By definition, all tipples depend upon coal mines. However, unlike the situation in *Western*, where tipple and suppliers were created and operated independently, coming together when it was mutually advantageous, the initial decision to mine the Orbit property was made by its owners, the Roberts brothers, in order to satisfy the contractual demands of their tipple facility. That it was mined by others and that the facility is owned by the brothers' solely held corporation while the Orbit property is owned by them individually cannot change the fact that they leased their property to a coal mine operator through his solely held corporation to supply their tipple facility with all the coal he (or his sublessee) produced and that he did so. Moreover, they had every reason to believe that he would do so, for he, through another solely held corporation, had a close, ongoing business relationship with them; he borrowed money from them over a period of years, as security for which he pledged certain mining machinery, and his corporation was the largest supplier of coal to the brothers' tipple facility.

There is clearly a connection between the Roberts Bros.' tipple and the Orbit mine. However, is it the kind of connection contemplated by the regulations? Must the activity "conducted * * * in connection with

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a surface coal mine" be derivative in nature? That is, must it depend for its existence upon the surface coal mine? If so, Roberts Bros. would not be included. Orbit supplied only 2 percent of Roberts Bros.' coal (Answer to Interrogatory No. 2, dated Aug. 23, 1979). The mining operation came into existence after the tipple and, we are informed, ceased while the tipple continued operating. The facts in this case lead to the conclusion that the mine depended for its existence upon the tipple. Nevertheless, we conclude that such a derivative or incidental relationship is not necessary for an activity like that of Roberts Bros. to be included within the definition.

The language in the definition which appears to support an interpretation requiring such a derivative or incidental relationship is in the second part, 30 CFR 700.5, *Surface coal mining operations*, subsec. (b) and 30 U.S.C. § 1291(28)(B) (Supp. I 1977). Both state: "Such areas shall also include any adjacent land the use of which is incidental to any such activities" (*i.e.*, the activities enumerated in the first subsection); both contain the same dangling, concluding phrase: "resulting from or incident to such activities." That language describes adjacent areas upon which certain activities take place in addition to the areas upon which the activities enumerated in the first subsection occur. It is apparently intended to define additional areas to be covered, not to describe, define, or limit the activities included in the first subsection.

No such derivative language ("resulting from or incident to") is found in the first subsection defining activities in connection with a surface coal mine.[1] Nor can we discover any Congressional or Secretarial intent that the definition of such activities be so limited. That Orbit supplied only 2 percent of Roberts Bros.' coal supply does not alter the fact that the tipple was conducted in connection with Orbit and at or near the minesite. Accordingly, we affirm Administrative Law Judge Truswell's holding that the facility of Roberts Bros. is subject to the enforcement authority of OSM.

[2] Roberts Bros. also challenges the 15 civil penalty points assigned by the Administrative Law Judge for probability of occurrence. The Administrative Law Judge based this assignment on his finding that, because there is no sedimentation pond, "[w]ater pollution, the event the violated standard was designed to prevent, had occurred" (Dec. 8). OSM, through the testimony of its inspector and laboratory analysis of water samples taken from the receiving stream above and below the tipple and of discharges leaving the tipple, showed that the water in the stream, although poor to begin with,

[1] Except in the proviso, which is irrelevant.

was further polluted by the addition of discharges from the tipple.[2]

Roberts Bros. argues that this evidence should not have been admitted because of failure to show a proper chain of custody. The OSM inspector testified that she took ten samples and preserved the five that were to be tested for iron with nitric acid according to EPA requirements. Because of the lateness of the day, Larry Emmons, another OSM inspector participating in the inspection, refrigerated the other five samples at his home overnight (Tr. 29). These were to be tested for pH, acidity, and alkalinity. The laboratory report is signed: "Relinquished by: Laurence W. Emmons" (Exh. R–11).

That Inspector Emmons did not testify does not destroy the admissibility or credibility of this evidence. Roberts Bros. had at least three options in this instance: It could have challenged Inspector Kowaleski's testimony on cross-examination; it could have sought to force the appearance of Inspector Emmons; or it could have taken its own water samples and disputed the analysis directly. It did none of these things. Instead, it merely asserted that this testimony was hearsay, an objection going to the weight to be given the evidence, not to its admissibility.[3] The Administrative Law Judge committed no error in relying on this evidence to establish that further water pollution had occurred in assigning civil penalty points. We, therefore, affirm the 15 points assigned for probability of occurrence and the resulting total civil penalty of $460.

The Nov. 19, 1979, decision of Administrative Law Judge Truswell is affirmed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

I view the applicability of the Act and regulations to processing plants to be derivative. First, a regulated mine must be found. Then a processing plant must be located that is operated in connection with and is sufficiently near that mine.[1] A plant

[2] Ten samples were taken: four each above and below the tipple and two at the tipple. Analysis showed a pH of 2.88 and 2.83 above the tipple, 2.53 at the tipple, and 2.77 and 2.81 below the tipple (Tr. 32). Analysis for iron showed a similar pattern (Tr. 31).

[3] Where there is no statute or regulation to the contrary, hearsay evidence is generally admissible in administrative proceedings. *See Richardson* v. *Perales*, 402 U.S. 389 (1971); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); 5 U.S.C. § 556(d) (1976).

[1] In a broad sense, every coal processing plant is operated in connection with coal mining. Otherwise the plant would not exist. But a connection with a mine (or mines under appropriate circumstances), not mining, is the connection that must be found. *See Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980); *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980). The *Drummond* cases are also illustrative of the proposition that whether or not a plant is "near" the minesite depends upon the circumstances.

has no independent status. It must be, for our purposes, an extension of a regulated mine and, therefore, subject to regulation.[2] Consequently, if the relationship between the mine itself and the processing plant is one that supports the required connection and nearness, any violation should be that of the mine operator and not the plant owner unless the two entities are the same.[3] In this case the mine permittee is Orbit Mining Co., not Roberts Bros. Roberts Bros. is the plant operator and the landlord of Orbit. No suggestion has been made that this arrangement is a device or scheme to avoid regulation by OSM (or even if it were that such would not be allowable).[4]

By the majority holding, this Board is now extending OSM's regulatory authority so that it applies to a plant operator who neither owns nor controls a nearby mine. The only connection with the mine here is ownership of the land on which the mine operates, which land has been leased to a nonrelated entity that operates it.[5] Instead of deriving OSM's authority to regulate a processing plant from its conceded power to regulate a mine, the Board is now, for the first time, stating that whenever a "connection" between a plant and a mine can be found (in this case one of landlord and tenant), each is separably regulable. I dissent.

MELVIN J. MIRKIN
Administrative Judge

[2] Were a plant to be deemed an independent, regulated entity, either by our construction of the existing regulations or their modification by the Secretary, the exemptions and immunities available to actual mines would supposedly be applicable to preparation plants, *e.g.*, the 2-acre exemption of 30 CFR 700.11 or the requirement of regulation of the activity by a state enunciated in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 450 (1979). Moreover, how is a preparation plant to involve itself with the "regulatory authority" in the many ways contemplated by 30 CFR 715 when there is no regulatory authority that either claims or concedes any kind of jurisdiction over it?

[3] Where the mine operator and the plant operator were different entities, but where we nevertheless found the plant to be operated in connection with the mine, we have held the mine operator, not the plant operator, to be liable. *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 I.D. 380 (1980).

[4] We have held that common ownership can be evidence of a connection between a mine and a preparation plant, but in that case the owner was the permittee of both the mine and the plant (the state issued permits to preparation plants). *Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 87 I.D. 327 (1980).

[5] It should not be overlooked that although the amount of coal sent for processing to Roberts Bros. by Orbit is the total output of Orbit, it is merely 2 percent of the total amount of coal processed by Roberts Bros. (majority opinion, p. 444).

ALABAMA BY-PRODUCTS CORP.

2 IBSMA 298

Decided *September 30, 1980*

Notice of appeal by the Office of Surface Mining Reclamation and Enforcement from the Mar. 10, 1980, decision on remand of Administrative Law Judge David Torbett in Docket Nos. NX 8-26-R and NX 8-27-R, vacating Notices of Violation Nos. 78-II-14-1 and 78-II-14-2 issued to Alabama By-Products Corp. for alleged violations of the topsoil provisions of 30 CFR 715.16.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

A state regulatory authority may rely on data published by the Department of Agriculture Soil Conservation Service on established soil series in comparing native topsoil to proposed alternative materials under 30 CFR 715.16.

APPEARANCES: J. Fred McDuff, Esq., and Fournier J. Gale III, Esq., Birmingham, Alabama, for Alabama By-Products Corp.; J. T. Begley, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of a decision of Administrative Law Judge David Torbett vacating two notices of violation issued to Alabama By-Products Corp., (ABC), for alleged noncompliance with the topsoil provisions of 30 CFR 715.16. For the reasons discussed below, we affirm that decision.

Background

On Aug. 16, 1978, OSM inspected ABC's No. 50 and No. 50–A surface mining pits in Jefferson County, Alabama, pursuant to the Surface Mining Control and Reclamation Act of 1977.[1] OSM issued Notices of Violation Nos. 78–II–14–1 and 78–II–14–2 to ABC for the alleged failure to remove, segregate, and stockpile topsoil as required by 30 CFR 715.16.

ABC sought administrative review of these notices, and on Mar. 1, 1979, a hearing was held at the close of which Administrative Law Judge Torbett vacated both notices. In vacating the notices, he found that ABC was using alternative materials in place of topsoil, that ABC had obtained approval for the use of alternative materials from the State regulatory authority, and that ABC had shown that the use of alternative materials was equal to or better than the use of native topsoil in achieving revegetation. OSM appealed that decision to the Board. An oral argument was held on July 10, 1979, and on Sept. 14, 1979, the Board issued a decision holding that "regardless of whether or not ABC had a mining and reclamation plan approved by the State of Alabama before the regulations [in 30 CFR 715.16] became effective, that plan must now meet the requirements of the interim regulations," *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 86 I.D. 446, 448 (1979), and remanding the case to the Hearings Division. The Board

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1201–1328 (Supp. I 1977).

required further findings on three questions:

1. Whether the demonstration made by ABC and the approval given by the State regulatory authority were commensurate with the requirements of 30 CFR 715.16 (a) (4) (i) and (ii);
2. Whether approval, if commensurate with those requirements, was made before the use of alternative materials was commenced; and
3. Whether the alternative materials were being removed, segregated, and replaced in conformance with 30 CFR 715.16.

Alabama By-Products Corp., supra at 247, at 450.

On Feb. 2, 1980, Administrative Law Judge Torbett held a second hearing on the questions remanded by the Board. At that hearing, ABC presented evidence that the State regulatory authority had before it on Nov. 15, 1977 (Tr. 21), a March 1973 U.S. Department of Agriculture Soil Conservation Service study of the Montevallo soil series (Tr. 28–29, 41), the series present at the mine in question, and two reports on the spoil in the area of the mine, dated July 22, 1977, and prepared by Auburn University (Tr. 27, 30). ABC did not voluntarily or at the request of the regulatory authority present additional site-specific tests of the Montevallo series (Tr. 25–26, 38). The OSM inspector testified that he had not observed any stockpiles of homogenous alternative materials at the mine at the time of the inspection (Tr. 12). ABC testified that there were no stockpiles because reclamation was almost concurrent with mining (Tr. 45–46).

In his decision from the bench, which was confirmed in writing on Mar. 10, 1980, after OSM filed a posthearing brief, the Administrative Law Judge found that the regulatory authority's approval was based on general knowledge of Alabama topsoil and the studies presented to it and that approval was given before the interim regulations became effective. Furthermore, he found that segregating and stockpiling topsoil was not required because of the way reclamation was conducted at this site. Upon the receipt of posthearing briefs he repeated that the regulatory authority had sufficient probative evidence before it upon which it could base a reasoned decision. OSM appealed this decision on Apr. 10, 1980, and both parties filed briefs.

Discussion and Conclusions

[1] The Administrative Law Judge resolved all of the questions on remand to be in favor of ABC and we see nothing in our examination of the record to disturb that resolution. Indeed, the only serious question presented is whether the Alabama Surface Mining Commission, the regulatory authority in charge, was entitled to rely on a study of the Montevallo soil series published by the Soil Conservation Service in comparing that soil series with proposed alternative materials. OSM urges, instead, that specific analysis of the topsoil for which substitution is sought must be presented to the regulatory authority. We reject this interpretation. A

topsoil analysis based on U.S.D.A. Soil Conservation Service published soil series data can be sufficient compliance with 30 CFR 715.16(a)(4), and it was so in this case.[2]

The decision of the Hearings Division is affirmed. ABC's request for oral argument is denied.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN CONCURRING:

I agree with my colleagues' result, but I think some further discussion is warranted.

For some time I have been troubled in this case by the question of who speaks for OSM, with what authority, and with what effect. On May 13, 1980, OSM's Knoxville Field Solicitor filed a brief arguing that the demonstration concerning suitability of alternative materials made by ABC was not commensurate with the requirements of 30 CFR 715.16(a)(4)(i). On June 2, 1980, OSM Director Heine issued a "final interpretive rule" concerning this regulation. (45 FR 39446, June 10, 1980.) Its purpose was to "[m]ake clear that the physical and chemical analyses, trials or tests, required by 30 CFR 715.16(a)(4)(i) * * * may be obtained from any one or a combination of the following sources: (a) U.S. Department of Agriculture Soil Conservation Service published data based on established soil series" and, indeed, the language of the rule so provided.[1] Two months later ABC filed a supplemental brief saying that it had not become aware of this interpretive rule until after it had filed its original brief (on June 30) and pointing out that the interpretive rule fully supported its argument throughout the case. A month after that OSM's Knoxville Field Solicitor filed a response "suggesting" the interpretive rule did not stand for the "proposition asserted" by ABC but, rather,

> Stands for two propositions:
>
> 1. Where the operator demonstrates that the topsoil and unconsolidated material beneath are of *insufficient quantity*, only the substitute materials must be analyzed in accordance with 30 CFR § 715.16(a)(4)(1);
>
> 2. If the operator desires to use overburden materials as a substitute for topsoil because the topsoil is of *insufficient*

[2] OSM's own interpretation of what constitutes acceptable practice coincides with this opinion. In Interpretive Rule 715.200(c), OSM provides that topsoil analyses may be based on "U.S. Department of Agriculture Soil Conservation Service published data based on established soil series." 45 FR 39447 (June 10, 1980). This interpretation is eminently reasonable and we concur with it.

[1] 45 FR 39447 (June 10, 1980) (to be codified at 30 CFR 715.200(c)) reads:

"(c) *Interpretation of § 715.16(a)(4)—Topsoil Removal.*

"(1) Results of physical and chemical analyses of topsoil and selected overburden materials to demonstrate that the selected overburden materials or overburden materials/topsoil mixture is more suitable for restoring land capability and productivity than the available topsoil, provided the analyses, trials, or tests are certified by a qualified soil scientist or agronomist, may be obtained from any one or a combination of the following sources:

"(i) U.S. Department of Agriculture Soil Conservation Service published data based on established soil series."

quality as compared to the substitute, then both the topsoil and the substitute materials must be evaluated in accordance with 30 CFR § 715.16(a)(4)(i) (in order to demonstrate the superior quality of the substitute materials). [Italics in original.]

He then argued that proposition No. 2 is applicable in this case.

Neither OSM's Field Solicitor nor ABC discussed whether or under what circumstances an interpretive rule issued by OSM's Director may be binding on anyone other than OSM. Nor will I, absent any suggestions from counsel, since it is not necessary to the disposition of this case. But these and other questions concerning interpretive rules await full discussion and deliberation in the proper case. Among the other questions are what procedures must be followed in issuing, and who must sign, an interpretive rule in order for it to have the effect of law and whose interpretation of an interpretive rule is final if and when it does have that effect.

WILL A. IRWIN
Chief Administrative Judge

APPEALS OF DOT SYSTEMS, INC.

IBCA–1197–6–78 & IBCA–1204–8–78

Decided *September 30, 1980*

Contract No. 68–02–2834, Environmental Protection Agency.

Appeal No. 1197–6–78 dismissed. Appeal No. 1204–8–78 denied.

1. Contracts: Disputes and Remedies: Jurisdiction

Where the Board finds an indefinite quantity option-type contract to have been consummated by the parties, as opposed to a requirements-type contract, the contractor assumes the risk of whether the Government will order more than the minimum estimate of services anticipated to be ordered, and the Board, as a matter of law, is without jurisdiction to grant an equitable adjustment to the contractor under the changes clause, termination for convenience, or other contract clauses for claimed costs alleged to have resulted from the negligent preparation of maximum estimates.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction

Where a contractor does not elect to come under the Contract Disputes Act of 1978, except as contained in counsel's posthearing reply brief; the contract is awarded in Aug. of 1977; no claim is pending before the contracting officer on Mar. 1, 1979; and the contracting officer reviews claims already denied after a prehearing conference conducted in Aug. of 1979, in a final attempt to reach a settlement before hearing; the Board holds that, in such circumstances, no valid election to come under the Act has been made, and therefore the Board has no jurisdiction under the Act.

3. Contracts: Disputes and Remedies: Termination for Convenience

Where it is undisputed that the Government ordered the minimum amount of services required to be ordered under an indefinite quantity option contract, and the Board finds that the failure of the contractor to timely perform delivery of the last seven call orders for services did not result from the low volume of work ordered by the Government, but instead, from reduction of typing staff, reduction of hours of typists employed to perform

the contract, and failure to give priority to the contract work over other work, the contractor will be denied its request for a conversion of a termination for default to a termination for convenience of the Government.

APPEARANCES: Mr. Robert A. Johnson, Johnson & Vickery, Vienna, VA, and Mr. Paul L. Waldron, Thompson & Waldron, Washington, D.C., for Appellants; Mr. Anthony G. Beyer, Government Counsel, EPA, Durham, North Carolina, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Contract No. 68-02-2834 was awarded to DOT Systems, Inc., of Vienna, Virginia (appellant), effective Aug. 15, 1977, by the Environmental Protection Agency (EPA), to provide typing support services for EPA's Office of Administration and component offices at Research Triangle Park, North Carolina. The initial performance period was from Aug. 15, through Sept. 30, 1977. The Government exercised one of its three options to extend the performance period for 12 months, extending the contract from Oct. 1, 1977, through Sept. 30, 1978.

The contract was executed by Mr. Franklin C. Broadwell, President of appellant, and by Mr. C. L. Foster, Contracting Officer for the Government. It was identified as an indefinite quantity, indefinite delivery, fixed unit price contract with the typing services to be performed by the contractor upon call orders issued by the Government from time to time. The contract listed various types of typing services to be performed in turnaround times of 48 hours, 72 hours, or 96 hours, but with a limitation on the quantities of each type work required to be completed and delivered by the contractor during any one month or any one week.

The quantity of work to be performed under the contract was governed by Article IV thereof, *as amended*, which provided as follows:

ARTICLE IV—*INDEFINITE QUANTITY*

A. This is an indefinite quantity contract for the supplies or services specified in the Schedule and for the period set forth therein. Delivery or performance shall be made only as authorized by orders issued in accordance with the "Ordering" article of this contract. The quantities of supplies or services specified herein are estimates only and are not purchased hereby.

B. The maximum amount of supplies or services to which the Government will be entitled to order and the Contractor shall be required to furnish for the period ending September 30, 1977 shall be not more than $11,689.00 and the maximum amount of supplies or services required during the remainder of the contract (Options No. 1, 2, and 3) shall not exceed $397,889.00. The Government will order a minimum of $500.00 of the supplies or services set forth in the Schedule.

C. Orders issued during the effective period of this contract and not completed

within that time shall be completed by the Contractor within the time specified in the order, and the rights and obligations of the Contractor and the Government respecting those orders shall be governed by the terms of the contract to the same extent as if completed during the effective period of this contract, provided that the Contractor shall not be required to accept any orders beyond the completion date of the period of performance set forth in the schedule.

Appellant complained continually to the contracting officer throughout the contract performmance about the low volume of work ordered by the Government and, on or about Dec. 5, 1977, asked to be released from a contract requirement to maintain a typing facility in the area of Research Triangle Park, North Carolina. The contracting officer, however, by letter dated Jan. 19, 1978, directed appellant to establish a fully operational facility in that area in conformance with its commitment to do so in its response to the Request for Procurement (RFP). The contract work was performed without incident, except for the continuing complaints regarding the low volume of work, until May of 1978. On May 5, 1978, appellant made a request to the contracting officer for an adjustment of the contract providing for a $7,500 guaranteed monthly utilization of appellant's services retroactive to the effective date of the contract. In support of the request, appellant listed eight vouchers totaling $8,906.14 worth of work ordered by the Government for the period from Aug. 31, 1977, through Apr. 30, 1978. This total figure was corrected by $750 to a total of $8,156.14 by a subsequent letter, dated May 30, 1978. The two May 1978 letters were treated together as a claim by the appellant under the disputes clause. They charged the Government with bad faith because of the disparity between the Government's work estimates and the work actually ordered; for requiring the maintenance of the second office facility in the Durham, North Carolina, area; and because the EPA offices for which the contract work was to be performed had acquired additional word processing equipment to perform the work for which appellant claimed it had contracted.

By his decision of June 9, 1978, the contracting officer determined that there was "no contractual basis for the relief requested." His denial of the claim rested upon several points, including the following:

1. That the solicitation specifically stated that the type of contract contemplated by the Government would be an Indefinite Quantity, Indefinite Delivery with fixed unit prices contract.

2. That Article IV of the solicitation specified that the Government would order a minimum of $500 of the services set forth in the schedule, which was fulfilled.

3. That Article IV also stated in paragraph A that the quantities of supplies or services specified are estimates only and not purchased with the award of the contract.

4. That the last sentence of Article II provides that: "The above estimates [in Article II] are for pur-

poses of evaluation only and do not constitute a Government commitment as to the actual amount of work that may result under this contract."

5. That the Government has acted in good faith, in that the minimum requirement was fulfilled, and invoices properly processed; as much overflow typing as possible was given to appellant; and no requirements were imposed upon the appellant in the performance of the contract which were not contained within the contract itself and agreed to during negotiations.

Appellant sent a notice of appeal to the contracting officer, dated June 19, 1978, which was mailed to this Board on June 27, 1978, and docketed by the Board on June 30, 1978, as appeal No. IBCA–1197–6–78.

Appellant continued to perform acceptably under the contract until mid-July 1978 when a problem of delinquent deliveries developed resulting in the issuance of a termination for default by the contracting officer on Aug. 9, 1978. A timely notice of appeal to the Board was filed by appellant and docketed as appeal No. IBCA–1204–8–78, Sept. 20, 1978.

The two appeals were consolidated for hearing and decision. An evidentiary hearing was conducted at Arlington, Virginia, on Oct. 2 and 3, 1978.

By its complaint with respect to the first appeal, the appellant requested an equitable adjustment in contract price "as the Board may deem appropriate." The grounds were basically the same as contained in its claim submitted to and denied by the contracting officer, but alleging its belief of entitlement to an equitable adjustment in excess of $100,000, and significantly, alleging further in paragraph 6, the following: "At all times pertinent to this appeal, both parties interpreted the contract as requiring Respondent to order from Appellant its typing needs in excess of Respondent's capability to perform such services at the time of contracting."

This allegation was denied by the Government in its answer wherein it also alleged that the subject contract was not a "Requirements" contract, but rather, was negotiated and awarded to appellant as an "Indefinite Quantity" contract within the meaning of sec. 1–3.409(c) of the Federal Procurement Regulations.[1]

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[1] The Federal Procurement Regulations (FPR), found in Title 41 of the *Code of Federal Regulations* (CFR), at 41 CFR 1–3.409 (b) and (c), point out some of the differences between a "requirements-type contract" and an "indefinite quantity-type contract" as follows:

"(b) *Requirements contract*—(1) *Description.* This type of contract provides for filling all actual purchase requirements of specific property or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. * * * An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the con-

(Continued)

By its complaint with respect to the second appeal, appellant sought conversion of the default termination of the contract into a termination for convenience of the Government on the grounds: That any delay was the result of unanticipated low volume of work orders, beyond the control and without the fault or negligence of appellant, and therefore, excusable; that the Government's termination for default was issued without a proper cure notice; and that even if the cure notice was proper, the alleged deficiencies of performance were corrected prior to the issuance of the termination notice.

The pertinent allegations of the complaint in this appeal were denied by the Government.

Issues Presented On Appeal

Whether this Board has jurisdiction in the circumstances of appeal No. IBCA-1197-6-78 to grant an equitable adjustment as requested by appellant.

Whether, in the second appeal, appellant has sustained its burden in proving entitlement to a conversion from a default termination to a termination for convenience of the Government.

Discussion

Jurisdiction of the Board

A. Under the Contract Provisions

Appellant contends in its post-hearing briefs that the Board has jurisdiction of appellant's claim for an equitable adjustment due to negligently prepared estimates under both the changes and termination for convenience clauses; that the Board has jurisdiction under the Contracts Disputes Act of 1978; that the instant contract was in fact a limited form of requirements contract entitling appellant to an equitable adjustment under the changes clause as a result of the Government's increasing its own word

(Continued)
tract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. * * *

"(2) *Application.* A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time. Advantages of this type of contract are: * * * (iii) Where production lead time is involved, deliveries may be made more promptly because the contractor is usually willing to maintain limited stocks in view of the Government's commitment.

* * * * *

"(c) *Indefinite quantity contract*—(1) *Description.* This type of contract provides for the furnishing of an indefinite quantity within stated limits of specific property or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. * * * The contract shall provide that during the contract period the Government shall order a stated minimum quantity of the property or services and that the contractor shall furnish such stated minimum and, if and as ordered any additional quantities not exceeding a stated maximum which should be as realistic as possible. * * *

"(2) *Application.* An indefinite quantity contract may be used where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time and it is not advisable for the Government to commit itself for more than a minimum quantity. Advantages of this type of contract are:

* * * * *

"(iii) The obligation of the Government is limited.

processing capabilities during the contract performance; and that the contracting officer's directive that appellant maintain a facility in the Durham, North Carolina, area constitutes a compensable change.

Although the Board is not unsympathetic with appellant's position on the merits in this case, in view of the wide disparity between the Government's estimates of maximum quantities of services anticipated to be ordered under the subject contract and the quantity actually ordered, the question of *jurisdiction* of the Board to grant the relief requested must first be resolved.[2]

Appellant complains of the Government's tactics in not raising the jurisdictional question at pretrial or at the hearing and by raising the question only in its posthearing brief. We point out, however, that a question of jurisdiction of any tribunal has traditionally and fundamentally been held many times to be subject to question by any party or by the tribunal itself at any time before decision.

We also point out that sec. 4.105 of our Interim Rules of Practice states that the "Board has authority to raise at any time and on its own motion the issue of its jurisdiction." We grant that the Government here could have, and perhaps should have raised the question sooner and more directly than it did. However, appellant was not entirely without notice. As noted above, in his decision of June 9, 1978, the contracting officer determined that there was "no contractual basis for the relief requested" (Appeal File I–2).

To sustain its position that the Board does have jurisdiction to grant appellant an equitable adjustment, appellant argues that the type of contract involved here was really a "limited requirements contract" (Appellant's Reply Brief, pp. 18–21). In fact, a careful review of the pertinent cases relied upon by appellant reveals that they were all involved with some form of a requirements contract as opposed to an indefinite quantity, indefinite delivery option contract. Appellant argues that the determination of the type of contract involved should not rest on the label attached to it, but rather on its substantive provisions. We agree that such determination should not rest on the label alone, although the label does have some persuasive force in identifying the intent of the contracting parties at the time they entered into the contract. Regardless of the determining factors otherwise involved, it is clear that the Board must first reach a conclusion with respect to the type of contract consummated by the parties as a preliminary basis for deciding the jurisdictional question.

What, then, are the indicia presented by the contract documents?

[2] For a discussion of the jurisdiction of agency Boards of Contract Appeals being limited to that provided by the Disputes Clause and other specific contract clauses (prior to the Contracts Disputes Act of 1978), *see United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966).

1. Article IV of the contract (set out in the background statement above) sets forth that the maximum services to be furnished by the contractor shall not exceed $11,689 during the first period or $397,889 during the remainder of the contract and that the Government will order a minimum of $500. The contract is stated to be "an indefinite quantity contract."

2. The Solicitation for Bids was issued on standard form 33A and the instructions and conditions thereof at page 25 provided: "25. TYPE OF CONTRACT CONTEMPLATED. It is contemplated that an Indefinite Quantity, Indefinite Delivery Contract with fixed unit prices will result from this solicitation."

3. The offer of the appellant, dated June 27, 1977, and executed by Mr. Broadwell, was immediately preceded, on standard form 33, entitled, Solicitation, Offer, and Award, issued on May 27, 1977, by the following words in capital letters: "THIS IS A 100% SMALL BUSINESS SET-ASIDE *TYPING SUPPORT SERVICES* (*INDEFINITE QUANTITY, INDEFINITE DELIVERY*)." (Italics in original.)

4. Article XX of this contract, entitled, "Right to Award Other Contracts and Orders" stated: "The Government (EPA) reserves the right to award contracts and orders to other companies for like services during the same performance period as this contract."

On the basis of the foregoing indicia, we find and conclude that the type of contract involved in these appeals is a fixed unit price, indefinite quantity, indefinite delivery option-type contract—not a requirements contract. We are particularly influenced toward that finding and conclusion by Article XX of the contract. That provision clearly removes the subject contract from the category of a requirements contract, limited or otherwise, by permitting the Government to contract with other parties for the same services during the same performance period.

So, what is the effect of that conclusion on the rights and obligations of the parties?

Appellant relies heavily on *Integrity Management International, Inc.*, ASBCA No. 18289 (Apr. 24, 1975), 75–1 BCA par. 11,235, *aff'd On Reconsideration*, 75–2 BCA par. 11,602, which held that in a *requirements contract* for food services required of the contractor, a negligently prepared estimate constituted a partial termination for convenience of the Government. In *Radionics, Inc.*, ASBCA No. 20796 (Feb. 28, 1977), 77–1 par. 12,448, the Armed Services Board found that the record did not support the allegations of negligence in the preparation of the Government estimates, and therefore, did not reach the question of whether the rule in *Integrity Management* should apply. It did, however, undertake to identify the difference

of risk assumed by a contractor in a *requirements contract* as opposed to an *indefinite quantity option* contract stating at page 60,312:

> There is a fundamental difference between a requirements contract of the type represented by the *Integrity Management* case and an indefinite quantity option contract. In a typical requirements contract the Government undertakes to procure from the contractor either all or a specifically-defined portion of its requirements for certain supplies or services that will develop during the contract period. The exact requirements are usually not known but the contractor has the right to receive whatever business was generated in the specified areas. Estimates of the expected amount of services or supplies to be required are furnished to guide the bidders in establishing their unit prices for the required services or supplies. *Since the contractor assumes only the risk of fluctuating objective requirements, relief has been granted in cases of negligently-prepared Government estimates because they constituted misrepresentations on which the contractor relied to its detriment.*
>
> Under an indefinite quantity option contract the contractor is guaranteed orders for the basic or minimum quantity. There is no promise or legal obligation on the part of the Government to satisfy its requirements for this type of services or supplies from the available options, and, if it so chooses, the Government could procure additional quantities of such supplies and services from other sources. See 47 Comp. Gen. 155, 159 (1967). Thus the exercise of options is not necessarily determined by the Government's actual requirements during the contract period but by a number of other factors. *The holder of an option contract is thus from the outset put on notice of the risk it would assume in relying on the maximum quantity estimate for pricing purposes.* [Italics supplied.]

Based upon the authorities cited in its posthearing briefs, it is clear that appellant has failed to ascertain the difference between the risk assumed by a contractor pursuant to a requirements contract as distinguished from an indefinite quantity option contract.

[1] Appellant has sited no authority, and we have found none, which would permit this Board to grant an equitable adjustment under the changes clause or termination for convenience clause or any other contract provision of the type of contract involved here even if we were to find negligence on the part of the Government in preparing its estimates. Further, we find no evidence in the record of these proceedings in support of appellant's claim that the Government personnel involved with the administration of the subject contract acted in bad faith, or, at any time interpreted it as requiring the Government to order from appellant its typing needs in excess of the Government's own capability to perform such services at the time of contracting. It is thus apparent that no jurisdiction obtains in this Board to grant the relief requested under the contract provisions of the contract under consideration. Further, we find and hold that this record contains no evidence or cited authority which would form a basis for finding a compensable change in

the contracting officer's directive that appellant maintain its Durham, North Carolina, facility. In fact, that directive in our view constituted no change at all, either express or implied, since all the contracting officer did was to reiterate an existing contract provision. No change in this respect was involved. Since we find that the Board lacks jurisdiction to grant the equitable adjustment requested as a matter of law, we do not need to reach, and do not reach, the factual determination regarding the alleged negligence.

B. Jurisdiction Under the Contracts Disputes Act of 1978

As an alternative argument, appellant contends that even if the Board has no jurisdiction pursuant to the contract provisions, it does have jurisdiction under the Contracts Disputes Act of 1978 (the Act). If the Board does have jurisdiction under the Act, then, of course, it would have the authority to reform the contract under the enlarged powers granted to Boards of Contract Appeals by sec. 8(d) of the Act.[3] By permission of the Board, Counsel for the appellant submitted as an addition to the record a letter dated July 14, 1980, in which it stated that counsel for the Government agrees to the following as an accurate statement of the facts pertaining to possible grounds for jurisdiction under the Act:

> After the Pre-Hearing Conference on the above-referenced Appeals, Government counsel, Mr. Anthony Beyer, requested the Contracting Officer, Mr. Charles Foster, to again review Appellant's claims on the merits. Mr. Foster completed this review and again decided that Appellant's claims were without merit and denied that Appellant was entitled to any recovery.

We understand that the cited review by the contracting officer was requested as a final attempt to reach an amicable settlement in light of the views expressed at the prehearing conference. Appellant contends that in this circumstance, the claim, whether for breach of contract or otherwise, lodges jurisdiction with Board under the Act.

[2] We do not accept that contention. The prehearing conference was held Aug. 2, 1979. The contracting officer's initial decision was made June 9, 1978. The evidentiary hearing was held Oct. 2 and 3, 1979. The election to proceed under the Act was not made by appellant until set forth in its posthearing Reply Brief. The contract involved here was entered into in August 1977. Under this sequence of events, we are unable to find that any claim of appellant in these proceedings was pending before the contracting officer on Mar. 1, 1979, or initiated after that date. Thus, the election to come under the Act has no validity.

[3] Sec. 8(d) of the Contracts Disputes Act of 1978 broadens the jurisdiction of agency Boards of Contract Appeals "to grant any relief that would be available to a litigant asserting a contract claim in the court of claims." P.L. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613 (Supp. II 1978).

See our opinion in *L. M. Johnson, Inc.*, IBCA–1268–5–79 (Sept. 28, 1979), 86 I.D. 508, 79–2 BCA par. 14,069.

We hold, therefore, that appellant has not shown this Board's authority to grant an equitable adjustment as requested under either the contract provisions or under the Contract Disputes Act of 1978.

The Termination Issue

Appeal No. IBCA–1204–8–78

In its posthearing initial brief, appellant argues that the Government's termination for default was improper and should be converted to a termination for convenience, because: (a) the Government failed to properly exercise its discretion, and (b) the period of time set by the Government to cure the alleged deficiencies was unreasonable and without legal effect.

The Government, on the other hand, contends that the termination for default was proper because the continuing late deliveries resulted from appellant's abandonment of its obligations to perform under the contract, and that neither the unanticipated low volume of work nor appellant's dire financial position constitutes excusable cause for nonperformance.

In its posthearing reply brief appellant argues that delay in performing call order No. 99 was insignificant and not a legally sufficient ground for default termination; that the time period for curing the alleged deficiencies was unreasonable and improper; and that appellant's default, if any, was excusable because it was proximately caused by the Government's negligent contract estimates.

The evidentiary basis for the Government's charges of abandonment of performance includes the following:

(1) Testimony of the Government's Project Officer, Darlene Jones, (Tr. 2:127 and 2:132) to the effect that when call order No. 99, pertaining to important procurement documentation, was not delivered on time, July 17, 1978, she called the DOT office and the sole remaining staff typist stated that the DOT Systems project officer had instructed her to stop work on orders issued under the contract and to work on another project instead.

(2) The cure notice by letter dated July 18, 1978, from the contracting officer citing the deliquency concerning call order No. 99, requesting information as to the cause of the delay and steps planned to be taken by appellant's president to preclude continuation of the problems, and requesting a reply by July 31, 1978 (Appeal File, Tab I:4).

(3) The return receipt attached to the cure notice indicating that the same was received by DOT on July 21, 1978 (Appeal File, Tab I:4).

(4) The reply to the cure notice

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from DOT's president dated Aug. 1, 1978, and received by the contracting officer on Aug. 4, 1978, advising that DOT was undertaking an investigation of the matter; that it was emphasized to the staff that the contract work was to be performed within the prescribed schedule; and, suggesting that the low volume of work provided by the Government "has impacted on our staffing and internal processing procedures" which "could have contributed to any delay that we may determine to have actually occurred" (Appeal File, Tab I:3).

(5) Appellant's Exhibit No. 36 showing that for the period July 3 through Aug. 11, 1978, the 6-week period in which the delinquent performance problems arose, the remaining staff typist at the Durham office was limited to an average of 8 hours of work per week on the subject contract, while during the preceeding 6-week period, the average time of the two typists involved was 17 hours per week for each typist.

(6) Appellant's Exhibit No. 14, entitled, "Summary of Contractors Claims," indicating the performance of DOT with respect to the last seven call orders placed by the Government as follows:

Call Order No.	Date	Due Date	Date Received
OH 99	7/11/78	7/17/78	7/25/78
OH 100	7/14/78	7/20/78	7/27/78
OH 101	7/18/78	7/24/78	8/ 2/78
OH 102	7/21/78	7/27/88	8/ 4/78
OH 103	7/25/78	7/31/78	8/ 8/78
OH 104	8/ 1/78	8/ 7/78	8/14/78
OH 105	8/ 3/78	8/ 9/78	8/16/78

On Aug. 9, 1978, the contracting officer issued a Notice of Termination of the subject contract for default in accordance with Clause No. 11 of the General Provisions.[4] It was effective upon receipt, which was Aug. 14, 1978, as evidenced by

[4] The Default Clause, Sec. 11 of the General Provisions of the subject contract, provides in pertinent part as follows:

"11. Default.

"(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

"(i) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

"(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

* * * * *

"(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform

(Continued)

the return receipt (Appeal File, Tab I:2). Such notice also constituted the contracting officer's decision that appellant was in default due to its fault and negligence and that the volume of work ordered by the Government is not justification or excuse for DOT's continual failure to perform within the time required by the contract. We note that appellant failed to discuss in either of its briefs the last six call orders numbered 100–105, all of which were performed late according to the performance schedules and were part of the basis for the termination for default. We also observe that appellant cited, "*42 Products*, GSBCA Nos. 4534, 4562, 77–1 BCA par. 12,267 [par. 12,268]," where the Board by *dicta* indicated that had the appellant been able to establish that the Government was negligent in formulating estimates, the resulting failure to perform may have been deemed excusable. But again, that case involved a *requirements-type* contract and not an indefinite quantity option-type contract, such as involved here, where the contractor assumes the risk of the amount of services ordered by the Government over and above the guaranteed minimum. That the Government fulfilled its obligation to order the minimum of $500 worth of services is undisputed.

[3] Based upon the foregoing, and our review of the entire record in this appeal, we find: That the failure of the contractor here to accomplish timely delivery of the typing service with respect to the last seven call orders placed by the Government under the subject contract, did not result from the low volume of work ordered, but rather, from reduction of the typing staff, reduction of hours of typists employed to perform the contract, and failure to instruct employees to give priority to the contract work over other work. We further find that the Government has made out a prima facie case for a valid termination for default; that the contractor failed to adduce any evidence showing that the failure of performance was excusable under the provisions of Clause 11(c), General Provisions of the contract; that there was nothing improper about the cure notice issued by the contracting officer on July 18, 1978; and that the discretion exercised by the contracting offi-

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(Continued)
the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractural capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule."

cer in issuing both the cure notice and notice of termination was justified under the circumstances of this case.

Therefore, the request of appellant to convert the termination for default to a termination for convenience of the Government must be denied.

Decision

Having determined that the Board is without jurisdiction to grant the relief requested by appellant, appeal No. IBCA-1197-6-78 is dismissed. Having found that appellant failed to overcome the prima facie case established by the Government in support of the validity of its termination for default, appeal No. IBCA-1204-8-78 is denied.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

RUSSELL C. LYNCH
Administrative Judge

WILLIAM F. MCGRAW
Chief Administrative Judge

STEPHEN W. FOX

50 IBLA 186

Decided *September 30, 1980*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, declaring mining claim null and void. NM MC 58082.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Withdrawals—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

A mining claim located on land temporarily segregated from appropriation under the mining laws pursuant to 43 U.S.C. § 1714(b) (1976) is null and void ab initio.

2. Federal Land Policy and Management Act of 1976: Withdrawals—Mining Claims: Withdrawn Land—Secretary of the Interior—Withdrawals and Reservations: Effect of

Under 43 U.S.C. § 1714(b) (1976) a publication in the *Federal Register* of notification of an application for withdrawal, which publication temporarily segregates land from the operation of the mining laws, does not withdraw the land, and therefore the notice need not be signed by the Secretary or an individual in the Office of the Secretary who has been appointed by the President, by and with the advice and consent of the Senate.

APPEARANCES: Stephen W. Fox, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Stephen W. Fox appeals from a July 27, 1979, decision of the New Mexico State Office, Bureau of Land Management (BLM) declaring appellant's mining claim null and void ab initio. Appellant's claim was located on July 10, 1979, in the SE

¼ sec. 20, T. 22 S., R. 31 E., New Mexico principal meridian.

The lands claimed by appellant were temporarily segregated from the operation of the mining laws by a notice published in the *Federal Register* entitled "Notice of Proposed Withdrawal and Reservation of Lands." 43 FR 53063 (Nov. 15, 1978). The temporary segregation is the result of an application (NM 35375) filed by the U.S. Department of Energy on Oct. 13, 1978, for the withdrawal of approximately 17,200 acres. The Department of Energy desires the lands for a waste isolation pilot plant.

In his statement of reasons, appellant presents the following arguments: (1) The Department of Energy application for withdrawal is a renewal of an application filed in 1976, which is not provided for by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1782 (1976); (2) the provisions of 43 U.S.C. § 1714 (1976), pertaining to notification of Congress and public hearings, have not been complied with; (3) pursuant to 43 U.S.C. § 1714(b)(1) (1976), the Chief, Branch of Lands and Minerals Operations, is not empowered to sign withdrawal notices, therefore, the notification in the *Federal Register* is invalid.

[1] It is well established that a mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception. *Glen H. Brooks*, 45 IBLA 51 (1980). The claim was located on July 29, 1979, well after the segregation. Therefore, if the segregation is valid the mining claim was properly declared void ab initio.

[2] The temporary segregation was authorized by sec. 204(b) of FLPMA, 43 U.S.C. § 1714(b)(1) (1976), which provides:

> Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

Appellant's statement that application No. NM 35375, filed Oct. 13, 1978, is a renewal of an application filed in 1976, is not indicated by the record before the Board. It would be proper, however, for the Secretary to choose to follow the withdrawal procedure in sec. 1714, regardless of whether a previous application had been filed.

As to appellant's other arguments, a review of the legislative history of FLPMA has not disclosed any

guide as to interpretation of this section of the Act.

Sec. 1714(b)(1) provides a two-step procedure concerning withdrawals. The first step is the publication of notice in the *Federal Register* that an application for a withdrawal has been filed and setting forth the extent to which the land is to be segregated while the application is being considered by the Secretary. The statute provides for the termination of the segregative effect of the application upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of 2 years from the date of the notice.

Sec. 1714(c) is not applicable until after the Secretary, or one of his delegates has followed the procedure required under sec. 1714(b). It is not until withdrawal, as distinguished from segregation while an application or Secretarial proposal is being considered, that the congressional approval procedures required by sec. 204(c) are triggered. Therefore, appellant's objections that the procedures required by sec. 204(c) have not been met are premature, since the land in question has not been withdrawn by the Secretary.

The third argument of appellant is that the segregation of the lands is invalid because it is the result of an improperly issued notice. Appellant contends that, pursuant to 43 U.S.C. § 1714(a) (1976), the notice published in the *Federal Register* was required to be signed by the Secretary or one of the individuals authorized by the statute.

Sec. 1714(a) provides:

> On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

Again we must distinguish between a withdrawal and a temporary segregation. Sec. 1714(a) limits the Secretary's delegation of authority regarding *withdrawals*. In contrast, the published notice served only to temporarily segregate the land from operation of the public land laws under sec. 1714(b). The temporary segregation is limited to a maximum of 2 years, while a withdrawal may be for a period of 20 years. The temporary nature of the segregation leads to the conclusion that a notice of the application for withdrawal need not be signed by the Secretary or one of the limited delegates under sec. 1714(a).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS
Administrative Judge

WE CONCUR:

ANNE POINDEXTER LEWIS
Administrative Judge

FREDERICK FISHMAN
Administrative Judge

WAYNE E. DeBORD

50 IBLA 216

Decided *September 30, 1980*

Appeals from decisions[1] of the Colorado, Montana, and New Mexico State Offices, Bureau of Land Management, rejecting offers or cancelling 29 oil and gas leases.

Affirmed as modified.

1. Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest—Words and Phrases

"Interest in an oil and gas lease or offer." Where a party to a pooling agreement is authorized to advance funds for filing of drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor with interest and receive a consultation fee from the pooled proceeds of any leases issued, all parties to the agreement have an interest in each lease offer within the meaning of 43 CFR 3102.7, requiring the disclosure of interested parties.

2. Oil and Gas Leases: Applications: Drawings

Where a party to a pooling agreement is authorized to advance funds for filing drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor and receive a consultation fee from the pooled proceeds of the sale or assignment of any lease issued, the filing in a lease drawing for a particular parcel by more than one party to the agreement constitutes a multiple filing in violation of 43 CFR 3112.5–2.

3. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings

An entry card in a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2–1(a) where the offeror's name and address are affixed with a rubber stamp outside the preprinted boxes but are otherwise legible on the face of the card.

APPEARANCES: Lynn J. Farnworth, Esq., Moscow, Idaho, for appellants; Harold J. Baer, Jr., Esq., Office of the Solicitor, Denver Region, Denver, Colorado, for Bureau of Land Management.

[1] Appendix A contains a list of the cases consolidated, the appellants and the 29 leases affected. In IBLA 80–584, *Terrie K. Landis*, BLM approved a lease assignment by appellant to the Champlin Petroleum Co., "as to the interest it acquired" as a "bona fide purchaser," and canceled the overriding royalty interest retained by the appellant. Similarly in IBLA 80–675, *Vickie J. Landis*, BLM recognized Public Lands Exploration, Inc., as a bona fide purchaser from the appellant and canceled the overriding royalty interest retained by appellant. In IBLA 80–265, *Diane M. Weeks*, BLM denied an assignment from appellant Weeks to Terrie K. DeBord. The conclusions herein apply also to those cases.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

This case involves appeals from decisions of the Colorado, Montana, and New Mexico State Offices, Bureau of Land Management, rejecting appellants' offers to lease or cancelling appellants' leases because (1) they failed to comply with the disclosure requirements of 43 CFR 3102.7 [2] pertaining to "sole party in interest"; or (2) they violated the provisions of 43 CFR 3112.5–2 as to multiple filings; or (3) their drawing entry cards (DEC) were deemed not "fully executed" within the meaning of 43 CFR 3112.2–1(a).[3]

The State Officers ruled there was a failure of interested parties to make the required disclosures because of the "Pool Agreement for the Filing of BLM Entry Cards" entered into by the appellants on Mar. 18, 1978. Subsequent to that date, appellants' offers to lease were drawn with first priority in simultaneous oil and gas lease drawings in the several State Offices and in a number of cases oil and gas leases were issued. The State Offices have since determined from the agreement that (1) "all of the parties woud benefit from a lease when issued," (2) therefore they had a "joint interest" in each other's offers, and (3) Paul H. Landis had an interest in all their offers. Further, the New Mexico State Office based rejection on the fact that appellants had affixed their names and addresses to their DEC's by means of a rubber stamp applied so that the information was not inserted on the "appropriate" lines.

The "Pool Agreement" states that it was entered into for the purpose of 'spread[ing] the expenses and costs incurred in filing entry cards and paying annual leases for oil and gas lotteries" and so that "Paul H. Landis [might] manage and advise as to the entering of said cards and selling of said leases and render other advisory services." The agreement provides for reimbursement of Landis as to all expenses deemed necessary and beneficial by him, including "all funds advanced" by him *for filing entry cards* or paying annual lease rentals, all consultant or expert fees, "all services rendered and all advice given" by him as to filing entry cards and negotiating the sale of leases and all office or clerical expenses incurred by him. All parties to the agreement "who may have their entry card drawn for annual leases * * * agree, jointly and individually, to pay all expenses that have been incurred by and through this Agreement * * * *from the pro-*

[2] 43 CFR Part 3100 was amended effective June 16, 1980. 45 FR 35156 (May 23, 1980). References herein are to 43 CFR Part 3100 (1979).

[3] The following cases were rejected for the reason that the drawing entry cards were deemed not "fully executed": IBLA Nos. 80–258, 260, 263, 264, 265, 266, 269, 270, 271, 528, 584, 601, 618, 675, and 786.

ceeds of the sale of any said lease, immediately upon receipt of said proceeds." (Italics added.)

Payment may also be made from receipts from the assignment of any lease or by "any other approved property or negotiable instrument" acceptable to Landis. Interest on funds advanced for the filing of entry cards and paying annual leases shall be paid at 12 percent per annum from the date of payment. Furthermore, the agreement provides that Landis can institute "liens or other legal means [to secure payment of] the debts incurred by and through this Agreement" if no payment is made "within thirty (30) days of the receipt of funds from the sale of any and all leases acquired by and through this Agreement." In addition, "any lease sold [is] subordinated to said lien or liens." Landis is to furnish detailed billings of all expenses on an annual basis.

Landis also has "the option of refusing payment of the annual lease fees * * * for the renewal of any lease he deems a high risk or otherwise unprofitable. In such event, Landis agrees to notify the winner-holder of the lease and to reassign said lease, thereby allowing said winner-holder to pay the annual lease fees and remove the lease from this Pool arrangement."

The addition of parties to the agreement is done only with Landis' written consent. Withdrawal by any member "as to the filing of entry cards" may be done "at any time."

Finally, Landis "makes no guarantee that those parcels or lots advised to be profitable for filing will be productive or saleable to any oil company or other person."

[1] The Departmental regulation as to "sole party in interest," 43 CFR 3102.7, provides that a separate statement signed by "other interested parties" and the offeror, "setting forth the nature and extent of the interest of each in the offer," and a copy of their written agreement must be filed "not later than 15 days after the filing of the lease offer." Failure to comply will result in rejection of the lease offer or cancellation of any lease issued pursuant to the offer. *Mildred A. Moss*, 28 IBLA 364 (1977), *sustained*, *Moss* v. *Andrus*, Civ. No. 78–1050 (10th Cir. Sept. 20, 1978).

The question for decision is whether in the case of each appellant there were "other interested parties" so that the appellant should have complied with the disclosure requirements of the regulation. "Interest" is defined as:

> Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pusuant to any agreement or understanding existing at the time when the offer is filed.

43 CFR 3100.0–5(b).

In their statements of reasons for appeal, appellants contend that they do not have a "joint interest" in each other's offers and that the only advantage of the pool agreement is that "their cost of offering per lease is less because they have spread these costs." Furthermore, they argue that Landis has a "non-interest" in all their offers because he does not partake of the "speculative value" of a lease but is merely reimbursed for his expenses under a "credit arrangement." Appellants cite Board decisions involving leasing services wherein the leasing service was authorized by the offeror as sole and exclusive agent to negotiate the sale of any lease obtained, with an enforceable right to share in the profits of any sale. *E.g.*, *Frederick W. Lowey*, 40 IBLA 381 (1979), *appeal docketed*, Civ. No. 79–3314 (D.D.C. Dec. 7, 1979). In each of these cases we concluded that the leasing service held an "interest" in the lease offers. Appellants conclude that the pool agreement gave "no enforceable right * * * against any lease" to Landis or any party to the agreement and that therefore each of the named offerors is a sole party in interest. Appellants also cite several Board decisions involving leasing services wherein the leasing service selected lands, filed offers, and advanced funds on behalf of clients, entitling it to reimbursement. *See*, *e.g.*, *Geosearch, Inc.*, 39 IBLA 49 (1979); *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977). In each of these cases we held that the offeror was a sole party in interest because the offeror was not obligated to transfer any interest in any lease issued to the leasing service.

In the cases herein, Landis has an interest in each of the lease offers made pursuant to the pool agreement. He advances funds for filing entry cards and paying annual lease rentals under the terms of the agreement. He is also entitled to impose an unspecified charge on the pool as a "consultation fee," plus a general charge for office and clerical expenses. He is entitled to be reimbursed with interest *from the proceeds of the sale or assignment of any lease issued*, for which he may secure payment by "liens or other legal means." This is participation in the issues or profits which may accrue "in any manner" from the lease and is an "interest" within the meaning of 43 CFR 3102.7. 43 CFR 3100.0–5(b).

This case is distinguished from such cases as *D. E. Pack*, *supra*, and *Geosearch, Inc.*, *supra*, by the fact that under the agreement Landis has a contractural right to be reimbursed with interest from the proceeds of the sale of any lease issued, and not a general right of repayment. The cumulative debt owed to Landis by the pool is not required to be apportioned to the specific lease or offer or particular pool member for which it was incurred. The proceeds from any lease of any member can be used by Landis to reduce or discharge the debt owed

to him by all the members for services rendered in connection with all the offers and leases involved.

Further, the parties to the pool agreement have a joint interest in each other's offers made pursuant to the agreement by virtue of the fact that under the agreement Landis is reimbursed for the expenses incurred in filing their entry cards and paying their rentals from the proceeds of the sale of *any* lease issued, for which he may secure payment by "liens or other legal means." The proceeds from the sale of any lease issued constitute a central pool in which each party participates. This clearly is participation in the profits which may accrue "in any manner" from the lease and is an "interest" within the meaning of 43 CFR 3102.7. 43 CFR 3100.0–5 (b).

Appellants' contention that the pool agreement gave no enforceable right against any lease to Landis or any party to the agreement is incorrect. Pool members may withdraw only as to the filing of new entry cards. The definition of "interest" is broad. It includes legally enforceable rights, claims, *see H. J. Enevoldsen*, 44 IBLA 70, 86 I.D. 643 (1979), and participation in profits. 43 CFR 3100.0–5(b).

Accordingly, appellants should have compiled with the disclosure requirements of 43 CFR 3102.7 as to "other interested parties" when they filed their lease offers, and the State Offices were required to reject their lease offers and cancel their leases.

[2] The regulation as to "multiple filings," 43 CFR 3112.5–2, provides:

> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person of partly [*sic*] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1–6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater profitability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bona-fide [*sic*] purchaser as provided for in § 3102.1–2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued.

In their statements of reasons for appeal appellants contend that

Landis is not an "agent or broker" filing offers to lease on behalf of others but merely "a supplier of information and a lender of funds." The pool agreement, however, provides for reimbursement of Landis' expenses of filing entry cards, payment of rentals, administration and sale of leases, and a consulting fee for his services, with accrued interest. The interest of Landis comes within the intent of the regulation. By virtue of more than one offer filed pursuant to the agreement for a particular parcel, he has a "greater probability of success in obtaining a share of the proceeds" of any lease issued. Furthermore, Landis "will participate in any proceeds derived from" any lease issued.

Moreover, by virtue of the joint interest which all the parties to the pool agreement have in each other's lease offers, the filing of any two offers for the same parcel by any parties to the agreement constituted multiple filings within the meaning of 43 CFR 3112.5–2. The profits from any lease acquired could be used to reduce the debt owed collectively to Landis by all members of the pool. The agreement gave them a greater probability of success in obtaining an interest in any lease issued.

Under the multiple filing regulation, the State Offices were required to reject the lease offers and cancel the leases issued.

[3] Regarding appellants' drawing entry cards, it was recently held in *Bessie B. Landis*, 48 IBLA 354 (1980), that a drawing entry card for a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2–1(a) where the offeror's name and address are affixed with a rubber stamp outside the preprinted boxes but are otherwise legible on the face of the card. This is the case here. Until required by additional use of computers, efficient administration of the leasing program is not jeopardized thereby. Accordingly, we hold to our decision in *Landis* and modify the applicable decisions.[4] *See Brick* v. *Andrus*, Civ. No. 79–1766 (D.C. Cir. June 6, 1980); *Winkler* v. *Andrus*, 594 F.2d 775 (10th Cir. 1979).

Appellants have also raised a number of other peripheral issues. They indicate that Judith A. Lawton and Willis L. Lawton, Jr., were never signatory parties to the pool agreement. The Colorado State Office notes that it was informed by these parties that "their filings were pursuant to oral agreements" and that when asked as to the nature of such agreements they submitted copies of the pool agreement. BLM accordingly "assumed" that the Lawtons' filings were made pursuant to the pool agreement. In the alternative, the State Office would reject the Lawtons' offers for failure to "completely and accurately" respond to requests for additional information prior to issuance of the leases.

[4] The modified decisions are listed in n.3.

By their own admission the Lawtons apparently orally agreed to be bound by the written pool agreement, in which they were named parties. The fact that the agreement was oral makes no difference in deciding whether there has been a violation of the regulations. *H. J. Enevoldsen*, *supra* at 82.

Appellants also state that lease NM 33390 was issued to Wayne E. DeBord prior to his entrance into the pool agreement. The State Office decision indicates that the lease was issued as a result of a drawing on May 5, 1978, while the pool agreement is dated Mar. 18, 1979. This was a typographical error as is evident from the correct date—Mar. 18, 1978—on the face of the agreement included in the record. We also note that an agreement entered into by the parties on Sept. 10, 1979, identical to the Mar. 18, 1978, agreement, confirms "the oral agreements which have been in existence since the 1st day of August 1976."

Appellants also point out that the lease offer for lease NM 33424 made by Diane M. Weeks was rejected before a copy of the pool agreement had been submitted to the State Office. A "*Notice*" dated June 19, 1979, sent to the offeror drawn with third priority indicated that the lease would be issued to the offeror drawn with second priority. The record shows that the lease was erroneously issued "to the No. 2 drawee prior to the conclusion of the adjudication of the No. 1 drawee's offer to lease." This lease was properly canceled pursuant to the decision dated July 17, 1979.

Lease NM 36319 was canceled partly because Paul H. Landis' filings as attorney-in-fact for Bessie B. Landis and on his own behalf were held to constitute a multiple filing. The mere fact that Landis filed as attorney-in-fact for someone else and on his behalf does not per se constitute a multiple filing. He must have had an "interest" within the meaning of 43 CFR 3100.0–5(b) in the offer which he filed as attorney-in-fact. We have held, *supra*, that Landis had an interest in each of the lease offers made pursuant to the pool agreement. We also note that there is some question as to whether there has been compliance with 43 CFR 3102.6–1(a)(1) and (2).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

JOSEPH W. GOSS
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

APPENDIX A

IBLA Nos.	Name of Appellants	Lease Nos.
80-209	Wayne E. DeBord	C 27969
	Ilean M. Landis	C 28092 Acq.
	Judith A. Lawton	C 28108 Acq.
	Willis L. Lawton, Jr.	C 28142
		C 28150
80-210	Vincent J. Landis	M 44841
	Henry E. Cobb	M 45104
80-258	Terrie K. DeBord	NM A 38354
		NM 25868
		NM 35891
80-260	Kristie R. Cobb	NM 36154
		NM 33930
80-263	Vickie Landis	NM 36569
80-264	Paul H. Landis	NM 35366
		NM 36319
80-265	Diane M. Weeks	NM 33424
	Terrie K. DeBord	NM 36568
80-266	Wayne E. DeBord	NM 33390
80-269	Dan L. Morgan	NM A 35616
80-270	Vincent J. Landis	NM 33435
80-271	Henry E. Cobb	NM 33678
80-528	Judith A. Lawton	NM 37859
80-584	Terrie K. Landis	NM 33914
80-601	Wayne E. DeBord	NM 39092
80-609	Judith A. Lawton	NM A 39654 TX
80-618	Vickie J. Landis	NM 39090
80-675	Vickie J. Landis	NM 36410
80-786	Paul H. Landis	NM 39088
	Wayne E. DeBord	NM 39089

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